

Implementing the OECD Anti-Bribery Convention

UNITED STATES



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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Introduction

At OECD, the world's major exporting countries are fighting corruption in international business with legally binding rules, tough monitoring and public disclosure of shortcomings in national laws and enforcement efforts. Progress in the fight against corruption will enhance economic efficiency and level the playing field for conducting business internationally.

Under the OECD Anti-Bribery Convention, "The Convention against Bribery of Foreign Public Officials in International Business Transactions", each of the 30 OECD Members and 5 associate non-members commits to outlaw bribery of foreign public officials and submits to a rigorous review of its legal provisions and enforcement efforts. In 1999 the Convention entered into force and the country review procedure was started.

Country reviews are carried out by the OECD Working Group on Bribery in International Business Transactions (WGB) whereby all Parties to the Convention are represented. The resulting reports are published several months after examination by the WGB.

Each country report examines how national laws and rules implement the OECD Anti-Bribery Convention, how enforcement is assured and how related non-criminal law aspects are applied in practice. Each report identifies what works well in the country as well as shortcomings in the effective prevention, detection and prosecution of foreign bribery cases. Key national legal provisions are also included. The review of all 35 Parties to the OECD Anti-Bribery Convention is scheduled to be completed by 2007.

The order of examinations by the WGB is as follows: Finland, United States, Iceland, Germany, Bulgaria, Canada, France, Norway, Luxembourg, Mexico, Korea, Italy, Switzerland, Japan, United Kingdom, Hungary, Greece, Sweden, Belgium, Slovak Republic, Australia, Austria, Czech Republic, Spain, Netherlands, Denmark, Argentina, New Zealand, Poland, Portugal, Ireland, Slovenia, Chile, Turkey and Brazil.

Implementing the OECD Anti-Bribery Convention

REPORT ON THE UNITED STATES

Foreword

This report surveys the legal provisions in place in the United States to combat bribery of foreign public officials and evaluates their effectiveness. The assessment is made by international experts from 35 countries against the highest international standards set by the OECD Anti-Bribery Convention and related instruments. This report is published as part of a series of country reviews that will cover all 35 countries party to the Convention.

In an increasingly global economy where international trade and investment play a major role, it is essential that governments, business and industry, practitioners, civil society, academics and journalists, be aware of the new regulatory and institutional environment to:

- enhance the competitive playing field for companies operating world-wide;
- establish high standards for global governance; and,
- reduce the flow of corrupt payments in international business.

This regulatory and institutional environment is mainly based on two groundbreaking instruments adopted in 1997 by OECD Members and associated countries: the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("the Convention") and, the *Revised Recommendation on Combating Bribery in International Business in International Business Transactions* (the "Revised Recommendation"). The Convention was the first binding international instrument imposing criminal penalties on those bribing foreign public officials in order to obtain business deals and providing for surveillance through monitoring and evaluation by peers. The Revised Recommendation complements the Convention by its focus on deterrence and prevention of foreign bribery.

The OECD Working Group on Bribery in International Business Transactions (the "Working Group") is entrusted with the monitoring and follow-up of these instruments. The Working Group, chaired by Professor Mark Pieth, is composed of experts (government officials), from the 35 countries Parties to the Convention. These government experts developed a monitoring mechanism which requires all Parties to be examined according to a formal, systematic and detailed procedure including self-evaluation and mutual review. Its aim is to provide a tool for assessing the implementation and enforcement of the Convention and Recommendation.

In designing the monitoring mechanism, the Working Group was eager to respect the Convention's core principle of 'functional equivalence' under which the Parties seek to achieve a common goal while respecting the legal traditions and fundamental concepts of each country. Consequently, the Working Group examines each Party's anti-bribery provisions in light of its individual legal system.

Immediately after the Convention's entry into force in February 1999, the Working Group began conducting the first phase of monitoring to determine whether countries had adequately transposed the Convention in national law and what steps it has taken to implement the Revised Recommendation.

As the Working Group neared completion of this first phase, it moved progressively into a new and broadened monitoring phase. The second phase examines compliance and whether structures are in place to provide effective enforcement of the laws and rules necessary for implementing the Convention. The second phase also encompasses an extensive examination of the non-criminal law aspects of the 1997 Revised Recommendation.

The monitoring procedures developed for the Phase 1 and Phase 2 examinations are similar. For each country reviewed, a draft report is prepared which is submitted to a Working Group consultation. This report is based on information provided by the country under examination as well as information collected by the OECD Secretariat and two other countries who act as "lead examiners" either through independent research or, under Phase 2, through expert consultations during an on-site visit to the country examined. Consultations during on-site visits include discussions with representatives from various governmental departments as well as from regulatory authorities, the private sector, trade unions, civil society, academics, accounting and auditing bodies and law practitioners.

The outcome of the Working Group consultation is the adoption of the final country report, which contains an evaluation of the country's laws and practices to combat foreign bribery. Prior to issuing the final country report, the country under review has an opportunity to review the report and to comment on it. The country under review may express a dissenting opinion, which is then reflected in the final report, but cannot prevent adoption of the evaluation by the Working Group.

This Phase Two monitoring report of the United States describes the structures and the institutional mechanisms in place to enforce national legislation implementing the Convention and assesses the effectiveness of the measures to prevent, detect, investigate and criminalise the bribing of foreign public officials in international business transactions. Appendix 1 contains the evaluation made by the Working Group under the Phase 1. In Appendix 2, the reader will find extracts of the most relevant implementation laws and Appendix 3 contains suggestions for further reading. The Convention (*i*), the Revised Recommendation (*ii*), the Recommendation on the Tax Deductibility of Bribes (*iii*) and a list of Parties to the Convention (*iv*) are in Appendix 4.

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The Foreign Bribery Offence: Application and Practice by the United States

Introduction¹

Nature of the on-site visit

In March 2002, the United States became the second Party to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to undergo the Phase 2 on-site visit by a team from the OECD Working Group on Bribery in International Business Transactions.

The team from the OECD Working Group was composed of lead examiners from France and the United Kingdom as well as representatives of the OECD Secretariat. The meetings took place over the course of five days mostly at Department of Justice offices in Washington DC, and brought together officials from the following United States government departments and agencies: Department of Justice Criminal Division Fraud Section, Department of Justice Criminal Division Asset Forfeiture and Money Laundering Section, Department of Justice Public Integrity Section and Office of International Affairs, Department of State, Department of Commerce, Department of Defense, Federal Bureau of Investigation, US Sentencing Commission, Securities and Exchange Commission, Internal Revenue Service, US Agency for International Development, Overseas Private Investment Corporation and Export-Import Bank. Part of the team visited the Financial Crimes Enforcement Network of the Department of Treasury. Briefings were held with senior members of the Senate Foreign Relations Committee and with staff of the House International Relations Committee.

The OECD team met with representatives of the American Bar Association, the American Federation of Labor-Congress of Industrial Organisations (AFL-CIO), the American Institute of Certified Public Accountants, the Auditing Standards Board, the Compliance Systems Legal Group, the Conference Board, the Financial Executives Institute, Global Corporate Citizenship, the International Forum on Accountancy Development, the Institute of Internal Auditors, the Tax Executives Institute and Transparency International USA. Part of the team visited the World Bank. The team also met with senior representatives of the following corporations: the Boeing Company, DuPont, Lockheed Martin, Motorola, Raytheon International, and Schering-Plough Corporation. The examining team met with representatives of the following law and accounting firms: Clifford Chance; Covington and Burling; Dechert, Price and Rhoads; Dickinson Landmeier LLP; Foley and Lardner; KPMG; Miller and Chevalier Chartered; Shearman and Sterling; Troutman Sanders; Weil, Gotshal and Manges; and Wilmer, Cutler and Pickering.

Pursuant to the procedure agreed to by the Working Group for the Phase 2 self and mutual evaluation of the implementation of the Convention and the Revised Recommendation, the purpose of the on-site visit was to study the structures in place in

1. This report has been examined by the Working Group on Bribery in June 2002.

the United States to enforce the laws and regulations implementing the Convention and to assess their application in practice, as well as to monitor the United States' compliance in practice with the 1997 Recommendation. In preparation for the on-site visit, the United States provided the Working Group with answers to the Phase 2 questionnaire together with documentary appendices, which were reviewed and analysed by the visiting team in advance. Both during and after the on-site visit the United States authorities continued to provide the visiting team with follow-up information.

Methodology and structure of the report

The Phase 2 Review reflects an assessment of information obtained from the United States' responses to the Phase 2 questionnaire, the consultations with the United States government and civil society during the on-site visit, a review of all the relevant legislation and known case law, and independent research undertaken by the lead examiners and the Secretariat.

Since the purpose of Phase 2 of the monitoring process is to assess the implementation of the Convention and Revised Recommendation in practice, and most of the assessment is derived from the on-site visit, the Phase 2 Report is fact based and evaluative, identifying not only those features that work well, but also potential problems in the effective prevention, detection and prosecution of foreign bribery cases. It is therefore organised according to the issues identified by the examining team, rather than the sequence of questions in the Phase 2 questionnaire. The Phase 2 Report should be read in conjunction with the Phase 1 Report as, taken together, they provide an overall evaluation of the US legal and institutional framework in place for combating corruption of foreign officials.

The Phase 2 Report adopts the following structure: the introduction explains the background and context with regard to the United States. The second part examines the various factors which, in the view of the lead examiners, have a bearing on the effectiveness of the measures available in the US for preventing and detecting foreign bribery. The third part reviews the workings of the system for prosecuting foreign bribery and money laundering offences, with specific reference to features which appear to have a pronounced impact, either positive or negative, on the effectiveness of the overall effort. The last part sets forth the specific recommendations of the Working Group, based on its conclusions, both as to prevention and detection and as to prosecution. It also identifies those matters which the Working Group considers should be followed up as part of the continued monitoring effort. In addition, tables showing sanctions imposed in criminal and civil cases brought under the FCPA in relation to bribery of foreign public officials are annexed to the Report for information.

General observations about the on-site visit

The on-site visit was characterised in particular by the commitment and dedication of those officials of the United States Government, notably the Department of Justice (hereafter: the DOJ), with responsibility for enforcement of the Foreign Corrupt Practices Act. Their readiness to explain the legal and constitutional background against which the FCPA is implemented proved to be of great assistance to the lead examiners. It became clear in the course of the on-site visit that any objective assessment of the working of the FCPA requires an understanding of certain features inherent in the US legal system. In seeking to demonstrate why, taken in context, most features of the FCPA appear to

function efficiently, as well as pointing up those areas which could be improved upon, the lead examiners hope that the present review will promote such understanding.

The maturity of Foreign Bribery Legislation in the United States

The enactment of the Foreign Corrupt Practices Act (FCPA) in 1977 was a landmark in the effort to combat foreign bribery and attests to the pioneering role of the United States in this field. Now, with a history of substantive amendments in 1988 and 1998, and twenty-five years of practice built up around it, the Act can be evaluated as a mature piece of legislation. There is available not only a body of case-law (albeit mostly consisting of cases where the court has approved a negotiated plea agreement) but also a wealth of business practice, a cadre of experienced prosecutors and a developed specialist Bar, all contributing to an increasing level of public awareness.

Although, as will be seen, the number of prosecutions and civil enforcement actions for FCPA violations has not been great, the enforcement history demonstrates a willingness to prosecute large and medium-sized companies, and often high-level officers of those companies, alleged to have been involved in violations of the FCPA throughout the world. Those cases have arisen out of activities in over twenty different countries such as Argentina, Brazil, Canada, Colombia, the Cook Islands, Costa Rica, the Dominican Republic, Egypt, Germany, Haiti, Iraq, Israel, Italy, Jamaica, Mexico, Niger, Nigeria, Panama, Russia, Saudi Arabia, Trinidad and Tobago, and Venezuela. The illegal payments alleged have ranged from US\$22 00 to US\$10 million. These illegal payments represent varying percentages of up to 40 per cent of the business obtained. In most if not all prosecuted cases, the payments have taken the form of money, most often paid into third-country bank accounts.

Most of the criminal cases brought have involved direct and overtly corrupt payments to foreign government officials. The DOJ has prosecuted a variety of schemes, companies and individuals under the FCPA. Cases have involved industries such as the aircraft industry, the automotive industry, the construction industry, the energy industry, and the food and agriculture industry. For example, in one group of cases, the DOJ prosecuted a company and its high-level officers for bribing the officials of Pemex, the national oil company of Mexico, in order to gain several multimillion dollar contracts with Pemex. In another case, the DOJ prosecuted employees of a bus company for bribing officials of a provincial government in Canada to secure a contract to provide buses to the transit authority. Major companies like General Electric, Goodyear, IBM and Lockheed Corporation and their high-level employees have been the subject of criminal FCPA prosecution for various bribery schemes.

Over the years, there have been advances in the sophistication of the mechanisms used in bribery itself as well as in the techniques of enforcement. Generally, the pattern has changed from the classic suitcase filled with cash to more subtle scenarios involving intermediaries, complex transactions with government entities, and misstatements of business or promotional expenses. This has multiplied the suspicious indicators or so-called "red flags" companies need to look for – especially in the joint venture context and in foreign mergers and acquisitions – and has led to the need for an increasingly broad array of safeguards to be deployed.

The ongoing monitoring process provides an opportunity to take stock of the FCPA in the light of the OECD Convention and also of the changes that have occurred in the international legal and business environment. Foremost among these is the extensive and growing exposure of US corporations and their foreign subsidiaries to sensitive business

environments world-wide. US trade with developing countries, while significantly smaller than trade with industrialised countries, is continuously increasing both in absolute value and as a proportion of total US global trade. Growing at an average annual rate of 9.1 per cent between 1988 and 1998, US trade with developing countries accounted for more than 30 per cent of total US trade by 1998, with the Asia and Near East region and the region of Latin America and the Caribbean accounting respectively for 70 per cent and 23 per cent of total US trade with developing countries. US trade with OECD members accounted for 68 per cent of total US trade as compared with 71 per cent in 1988. These figures do not include sales by foreign affiliates of US companies, which play a determinant role in US global business activities. Foreign direct investment (FDI) has become an integral part of US corporate strategies, making the US the most prominent home country of international investment; the recent trend owes much to major cross-border mergers and acquisitions (M&As), estimated to account for 80 per cent of US FDI in late 1990.

In an era of increasing globalised trade, the Securities and Exchange Commission (hereafter: SEC) and Department of Justice investigations, prosecutions and civil enforcement actions for FCPA violations are expected to increase. Going forward, the lead examiners would encourage the United States to continue to build on the undoubted strengths of the FCPA which appear from this Report. At the same time, work could be done in order to make the FCPA a sharper and more focused instrument, better attuned to fighting foreign bribery on more and more fronts.

The liability of corporations under the FCPA and under US law generally

As a matter of background, one important factor when assessing the effectiveness of the FCPA is the nature of corporate liability under US law. According to the applicable theory, a company is liable for the acts of its directors, officers or employees whenever they act within the scope of their duties and for the benefit of the company. There is no additional requirement for a "mental element" such as the involvement or approval of a certain level of management. The resulting standard, as acknowledged by panellists during the on-site visit, is virtually one of strict corporate liability. This feature of US law is general, and not confined to the FCPA. Its effect is not only to reinforce the effectiveness of the FCPA but also – without distinction between issuers and non-issuers as defined by the Act – to encourage corporations to implement measures of deterrence throughout their organisations.

The FCPA also imposes liability for foreign bribery committed by third parties acting as agents. It is this ever-present threat of vicarious liability (liability for the acts of others) which, perhaps more than any other feature, has prompted the introduction of stringent "due diligence" practices among many large multinationals in selecting their local agents, business partners and sales representatives, and in screening potential joint venture partners who might bring with them the risk of possible hidden exposures. The lead examiners heard from a senior in-house counsel of one major US defence contractor whose policy was to interview, in person, prospective sales representatives in foreign locations in order to assess their level of understanding of, and compliance with, required standards of corporate conduct, principally based on the FCPA.

The potential for liability for the acts of foreign subsidiaries is also significant in this context. A foreign subsidiary of a US corporation is a foreign legal person, having the nationality of its country of incorporation, and is thus not technically subject to the FCPA anti-bribery provisions except in respect of acts done by it within United States territory.

However, a US parent company is itself at risk of liability if it is found to have authorised, directed or controlled a foreign subsidiary committing an act of bribery. Even a finding of “wilful blindness” or “reckless disregard” on the part of the parent company will suffice to trigger liability in the absence of express authorisation, though negligence alone will not. In the view of members of the Bar who regularly advise large corporate clients, this means that any form of effective control over the subsidiary’s activities will probably be enough to expose the parent company to the risk of liability. As a result, companies with sufficient knowledge of the FCPA are aware of the risks, especially, as the examining team heard, in the case of industries such as defence, construction and civil engineering, which rely to a large extent on government contracts. A US issuer parent company is obliged to enforce the FCPA books and records provisions in foreign subsidiaries which it controls (see below, section B).

Measures for Preventing and Detecting the Bribery of Foreign Public Officials

The role of the DOJ Fraud Section and the SEC in deterrence and prevention

The Fraud Section of the Department of Justice's Criminal Division has had, since 1994, sole control over the criminal enforcement of the FCPA. The commonly-held view among the members of the Bar who met with the examiners was that the reputation for aggressive pursuit that the Fraud Section of the Department of Justice has developed over the years has been a major factor in deterring companies from bribery. The business community, or at least the large companies, view the Department of Justice as committed to deterring foreign bribery. In spite of the fact that over the past twenty-five years there have been relatively few prosecutions, the record of steady effort spread over the years clearly demonstrates continuing serious commitment and dedication on the part of the Department of Justice to detect, investigate and prosecute bribery cases. Resources have been consistently assigned to deal with allegations of FCPA violations. Prosecutorial expertise has been developed and applied.

The SEC, too, is perceived by the business community as committed in its enforcement policy. Historically, the SEC has targeted the sort of accounting practices that would make it easier to conceal bribery in violation of the FCPA, enforcing the laws under its jurisdiction, including those requiring companies to file appropriate proxy statements and make appropriate disclosures.

Despite the abundance of articles and commentaries on the subject, there is only a limited amount of authoritative or official guidance available on compliance with the twenty five-year old statute. There are few litigated cases – civil or criminal – which test the outer limits of the FCPA or deal with the difficult questions raised by the "business purpose" test, payments to third party beneficiaries, the exercise of nationality jurisdiction, the scope of the definition of a foreign official, and other areas of uncertainty. Much of the authority or guidance regarding the Act comes from speeches from DOJ and SEC officials, DOJ opinions, DOJ and SEC complaints, settlements that have been filed, and informal discussions of issues between companies' counsel and the DOJ or the SEC. Some general publications are also available. There is an anti-corruption brochure issued by the Department of State and a brochure offering guidance on the FCPA published by the Departments of Justice and Commerce, as well as annual reports to Congress made by the Departments of Commerce and State, that also include a summary and analysis of laws, by country, that have been passed to implement the OECD Convention. These publications are produced in consultation and co-operation with the other agencies involved. There is also information on the tax deductibility of bribes. Lawyers and trade experts of the US Departments of Justice, State and Commerce, as well as websites maintained by each Department, are also available to assist US companies under the FCPA. The status of these various sources of information is however not always clear: there could be merit in regrouping and consolidating them in a single guidance document.

The DOJ opinion procedure and the need for further guidance

The Department of Justice has long maintained an FCPA review mechanism (previously Review Letters, now Opinions) through which a company that is about to engage in a transaction which might potentially give rise to issues under the FCPA may ask the DOJ about its enforcement intentions. The DOJ will, if requested, issue an opinion stating whether, on the facts as presented, it would take enforcement action.

These opinions do not have any value as binding precedent and are strictly limited to the facts of the particular proposed transaction, and the DOJ rarely explains its reasoning.

In practice, the procedure has been infrequently used. Since the procedure was started in 1980, the DOJ has averaged fewer than two of these opinions per year. As one might expect, the DOJ has been somewhat conservative in providing “no action” assurances, although recent opinions have shown a readiness to adopt a practical approach in reviewing increasingly complex international transactions, even suggesting acceptable alternatives. In the absence of a significant body of case law or of any guidelines, Counsel with a specialist FCPA practice have regularly looked to the DOJ opinions for guidance, and their function and usefulness was the subject of much discussion during the on-site visit.

From the discussion with the large corporations and in-house counsel who addressed the examining team, it appears that companies evaluate benefits, costs and risks when filing an opinion request. First, if the transaction is not cleared, the requestor must, in all likelihood, decline to go forward with the proposed course of conduct: proceeding under these circumstances could be tantamount to admitting that the party had the requisite “knowledge” that a corrupt payment would be made. Hence a company is unlikely to request an opinion if it is not ready to refrain from the envisaged action in case of a “negative” indication. Second, DOJ rulings are technically not binding on other federal agencies (although the SEC has publicly stated that it will refrain from prosecuting issuers that have obtained a positive DOJ opinion, *i.e.* an indication that DOJ would not take enforcement action with respect to the matter raised in the opinion).¹ Third, in today’s fast-paced commercial world, the thirty days within which the DOJ must render an opinion may be, in some circumstances, too long to make this a practical alternative; in fact, the opinion procedure can take longer than thirty days as the DOJ may request additional information after the initial request is filed. It is acknowledged that the DOJ has shown itself sensitive to the time constraints of a commercial transaction and has accelerated its review when appropriate, on one occasion taking only five days. Fourth, although the materials submitted are exempted from disclosure under the Freedom of Information Act, confidentiality cannot be assured because the DOJ retains the right to release a summary indicating, in general terms, the nature of the requestor’s business and the foreign country in which the proposed conduct is to take place, and the general nature and circumstances of the proposed conduct. Fifth, the facts submitted, if acted upon, may raise the possibility of a DOJ investigation. Prosecution is still possible even after the issuance of a positive opinion, as obtaining clearance only establishes “a rebuttable presumption that a requestor’s conduct... is in compliance with those provisions of the FCPA”. The risk is greater if the facts change, and the transaction goes ahead in a form which does not correspond exactly with the description supplied to the DOJ and on which the opinion was based.

It is no surprise that few of the proposed transactions that have led to the DOJ giving an opinion that it does not intend to take enforcement action have been obvious “borderline” cases. As indicated to the examining team, no company will approach the DOJ to seek a review of a transaction that might clearly involve an illegal payment. As a result, the DOJ opinion procedure probably does not contribute greatly to the overall deterrent effort. The procedure was innovative at the time it was introduced, but

1. A 1980 interpretative release (No. 34-17099, Aug. 28, 1980) stated that the SEC would take no enforcement action with respect to which an issuer had obtained a Release Letter from the Department of Justice prior to May 31, 1981. A subsequent interpretative release (No. 34-18255, Nov. 12, 1981) extended this policy “until further notice”. This statement of policy has not been revoked since 1981.

deterrence as such was never its intended goal. Despite these considerations, experience with the procedure among large companies and their counsel is generally positive. Furthermore, anecdotal evidence suggests that officials in the Fraud Section are prepared to discuss issues and alternatives informally with counsel and company representatives in situations that involve grey areas, in order to provide a higher degree of comfort to companies facing questions under the FCPA. This factor, along with the desire of a growing number of companies to seek guidance in structuring international mergers, acquisitions and joint ventures in such a way as to minimise the risk of “inheriting” liability, may well encourage the broader use of the opinion process in the future. The emphasis placed by the DOJ on devising and implementing compliance programs, often set out in quite specific terms as a condition for a positive opinion, could be of great assistance in structuring prospective international partnerships. One would also expect the procedure to be popular with counsel in truly risky areas, as a “negative” indication from the DOJ could relieve counsel from responsibility for making potentially difficult decisions. However, given that a company facing a potential negative opinion may withdraw from the procedure and that there are no statistics available, it is difficult to evaluate if and to what extent the procedure is used for that purpose.

Although most, if not all, companies and their in-house counsel interviewed by the examining team would like to have greater clarity in interpreting the FCPA, none of them seemed however prepared to champion a clear call for the issuance of guidelines. It should be mentioned in this connection that when, in 1988, the DOJ invited submissions from the profession as to whether guidelines should be issued about the FCPA, very little interest was shown. In the United States’ view, the FCPA’s terms are straightforward and are grounded in the well-established jurisprudence of domestic bribery law. In those instances in which a company is uncertain about the application of the statute to a particular transaction, the DOJ Opinion Procedure is available; a company that fails to take advantage of this procedure assumes the risk that its conduct may violate the law. In fact, opinion among corporations and law firms appears to be divided as to whether general guidelines would be useful as a deterrent. One view is that guidelines would be a “road-map for evasion”; the other view is that guidelines would help, in particular for the purpose of planning future overseas transactions.

Commentary

In the view of the lead examiners, the time has come to explore the need for further forms of guidance, mainly to assist new players (SMEs) on the international scene, and to provide a valuable risk management tool to guide companies through some of the pitfalls which might arise in structuring international transactions involving potential FCPA exposures. Also, consideration should be given to issuing guidelines in areas where a clear policy or position has emerged so to ensure that the DOJ’s existing expertise can thus be captured for the future.

Detection and investigation

Sources of allegations

Across the board over the last 25 years, allegations of FCPA violations have come to the attention of the US authorities by a number of routes. No central mechanism exists for recording, tracking or compiling statistics about the initial complaints or who makes them. Sources of allegations include competitors, former employees, companies that have an internal audit process and have discovered suspicious payments, subcontractors, joint

venture partners, agents, foreign government officials or party representatives, overseas representatives of the United States including FBI agents posted overseas, and newspapers and journalists. The very first FCPA case came about in the wake of a very short article in the *Los Angeles Times* about the Prime Minister of the Cook Islands, who was alleged to have received funding for his re-election campaign from an American businessman. Allegations are made in person, by telephone, facsimile transmission, mail, or through the bribery hotlines of the Departments of Justice and Commerce (although the Commerce hotline is primarily intended as a means for US companies to report allegations of bribery by foreign companies), or the SEC Complaint Centre. Each federal agency's Inspector General also maintains confidential hotlines to report suspected fraud and abuse.

Anonymous complaints have been an increasing source of allegations of FCPA violations in recent years. Where the identity of the complainant is known, enforcement authorities cannot guarantee that it will not be disclosed during the course of an investigation or prosecution. Whistleblowers have brought their allegations directly to the DOJ Fraud Section, to the FBI, to the SEC or to other agencies.

According to a trade union representative who addressed the examining team, whistleblowers are however discouraged from reporting FCPA violations by the lack of protection inherent in US employment law. The degree of protection afforded to an employee is at best a contractual matter and will depend upon whether the employee is covered by a collective bargaining agreement that provides for grievance procedures or whether she or he has an individual contract providing for termination with or without cause. In the vast majority of cases, however, the employment can be terminated at will and protection is minimal. By contrast, for federal employees, the Whistleblower Protection Act and the Inspector General Act of 1978 provide for civil protections against any reprisals for reporting conduct that "they reasonably believe evidences a violation of any law". Some states have passed similar laws to protect state employees.

FCPA allegations may arise in many other contexts, including federal agency audits such as those conducted by the Department of Defense, and by the Inspectors General of other agencies. For example, cases of FCPA violations involving foreign government procurement were brought to the attention of the DOJ by the Defense Contract Audit Agency in the course of the performance of routine audits on defence procurement contracts. Often, FCPA investigations also develop in the course of criminal investigations focusing on other matters such as antitrust violations.

It became clear during the course of the on-site visit that the sources of allegations of FCPA violations are many and varied. It also became clear that, because the sources of allegations are so numerous, the government potentially confronts problems of follow-up in the absence of any formal process centralising information or collating statistics about FCPA violation allegations, their number, their origin and actions taken if any. The Department of Justice acknowledged this in its *Attorney's Manual*, which requires that any information relating to a possible violation of the anti-bribery or record keeping provisions of the FCPA "should be brought immediately to the attention of the Fraud Section of the Criminal Division" [Dep't of Justice, United States Attorney's Manual, Policy Concerning Criminal Investigations and Prosecutions of the Foreign Corrupt Practices Act, 9-47.110 (2000)]. Developing and maintaining statistics about FCPA violation allegations could help in the detection of emerging or recurrent patterns or techniques of bribery, and the identification of vulnerable countries or industry sectors, and this in turn could assist in targeting investigative effort and resources to maximum effect.

Commentary

It is difficult to assess how effective the existing mechanisms have been in uncovering foreign bribery. The lead examiners believe that the investigation of foreign bribery cases would be enhanced by developing and maintaining statistics as to the origins of information about allegations of FCPA violations and what is done with it. In addition the lead examiners recognise that the issue of whistleblower protection is inextricably connected to the broader issue of witness protection and is not specific to the FCPA.

Investigations

The FCPA divides enforcement responsibilities between the Department of Justice and the SEC. However, because the FCPA casts such a wide net, FCPA violations may arise in a number of contexts. As a result, different agencies may get involved in the investigation of FCPA violations, in addition to the DOJ and the SEC.

Allegations of *criminal* violations of the FCPA are generally investigated by the Federal Bureau of Investigation (FBI), under the supervision of the Fraud Section of the DOJ Criminal Division. Located within the DOJ and required by its internal regulations to bring any allegation of a violation of the FCPA to the Criminal Division, the FBI is by far the most powerful of the federal law enforcement agencies, with broad powers to enforce the FCPA and an overall annual budget exceeding two billion dollars. The FBI currently employs nearly 25 000 people, including more than 12 000 special agents spread out over 50 field offices in the US and 20 foreign offices. FBI agents are trained and experienced in complex fraud investigations and use the most sophisticated methods of investigation in the form of witness protection programmes, informants and surveillance techniques. For example, in the *Tammenbaum* case (SDNY 1998), the government used an undercover investigation to catch the defendant after it became aware that the defendant was likely to engage in actions to bribe foreign officials: the FBI and DOJ prosecutors obtained permission from the Argentine Ministry of Justice to permit an FBI agent to pose as an Argentine government official.

Allegations of *civil* violations of the FCPA anti-bribery provisions by *non-issuers* are also investigated by the DOJ;² allegations of civil violations of the record keeping and anti-bribery provisions of the FCPA by *issuers* are, on the other hand, investigated by the SEC. SEC investigations against issuers are conducted by attorneys assigned to the Division of Enforcement in Washington D.C. and by enforcement attorneys in SEC regional offices. By contrast to the DOJ Criminal Division which can rely on the greater evidence-gathering tools available to its criminal prosecutors, the examining team was told by SEC representatives that, in the light of other priorities, FCPA investigations by the SEC have until now been constrained by limited enforcement resources and, as a

2. Non-issuers, for the purpose of the application of the FCPA, are "domestic concerns other than issuers", i.e. any corporation, partnership, association, joint-stock company, business trust, unincorporated organisation, or sole proprietorship that has its principal place of business in the United States, or that is organised under the laws of the United States, or a territory, possession, or commonwealth of the United States, as well as "any person other than an issuer or a domestic concern", i.e. any business entity that is organised under the laws of foreign countries and does not trade on the US stock exchange.

"Issuers" are essentially publicly-traded companies - any corporation (domestic or foreign) that has registered a class of securities with the SEC or is required to file reports with the SEC, e.g. any corporation with its stocks, bonds, or American Depositary receipts traded on US stock exchanges or the NASDAQ Stock Market, as well as their officers, directors, employees, agents and their shareholders acting on behalf of the issuer.

result, the SEC has pursued relatively few investigations of violations of the FCPA anti-bribery provisions.

Other investigative agencies than the FBI and the SEC Enforcement Division have participated or have taken the lead in some investigations, often when the FCPA allegation arose during a pending investigation. For example, the USAID Inspector General participated in the investigation of Metcalf and Eddy's bribing of an Egyptian official and the Criminal Investigative Division of the Environmental Protection Agency (EPA) was the lead agency in the investigation of Saybolt, Inc's bribes to Panamanian officials. In this latter case, Saybolt was under investigation by the EPA concerning data falsification allegations when the information regarding the improper payment was discovered.

The Internal Revenue Service (IRS) also plays a significant role in investigating illicit payments. Tax examiners are trained and experienced in detecting suspicious payments and, from the discussion with the tax experts who addressed the examining team, it appears that the US gives very detailed guidance to all tax examiners to assist them in the detection of suspicious payments as well as with investigative and interview techniques. The IRS can request a great deal of information in the course of an inquiry into the deductibility of payments to foreign public officials. Tax examiners will look at operating expenses, the use of foreign bank accounts, and the existence of slush funds. Audit guidelines also provide specific investigative techniques to enable examiners to detect illegal payments in particular industries. Furthermore, to obtain additional information related to slush funds, bribes, political contributions, and other tax-related information, the IRS has a special liaison with the SEC and the Financial Crimes Enforcement Network of the Department of Treasury. In addition, even though the US does not, unlike some other Parties to the Convention, have tax legislation requiring a general yearly reporting of commissions paid to third parties, there is mandatory reporting to the State Department in the case of export of arms under the Export Control Act; this information is accessible to the IRS.

Importance of the accounting requirements of the FCPA and the auditing requirements of the exchange act

General observations

The requirements of the FCPA as to accounting (the "books and records" provisions), which exist alongside the anti-bribery provisions, are an important complement in that they provide a powerful tool serving both as a deterrent to foreign bribery and a mechanism for its detection. The need for issuers to maintain records which accurately reflect transactions and the disposition of corporate assets, as well as the existence of mandatory internal accounting controls, appears to operate as a strong disincentive to the payment of bribes because it makes it less likely that they can be successfully disguised or concealed. Further, liability for failure to maintain books and records is independent of the bribery offence, does not require proof of intent and is punishable *per se*. It has been suggested that the deterrent effect could be strengthened by making it a formal requirement on management to report on internal controls in a report accompanying the financial statements, though the Financial Executives Institute indicated that many of their members already do this.

There are different rules regarding the applicability of the FCPA's record-keeping requirements to foreign subsidiaries of US issuers. An issuer will be liable for

enforcement of these requirements with regard to a subsidiary if it controls that subsidiary. As clarified by the then SEC Chairman Harold Williams in a formal statement of policy given in January 1981 and codified in section 78m(b) (6) in the 1988 amendments to the FCPA, the SEC applies practical tests in determining whether the issuer controls the subsidiary and is thereby bound to enforce the accounting provisions: "where the issuer controls more than 50 per cent of the voting securities of its subsidiary, compliance is expected. Compliance would also be expected if there is between 20 and 50 per cent ownership, subject to some demonstration by the issuer that this does not amount to control. If there is less than 20 per cent ownership, we will shoulder the burden to affirmatively demonstrate control."

Books and records violations are an invaluable source of information leading to the detection of foreign bribery, as well as providing an independent basis for liability in cases where the anti-bribery provisions cannot be invoked. In *SEC v International Business Machines Inc.*, a penalty was imposed on a parent corporation for having consolidated into its financial statements an item appearing on the books of its Argentine subsidiary, described as a subcontract payment, which was revealed to be a bribe. Parallel investigations by the SEC and the Department of Justice had revealed no evidence of knowledge on the part of the US parent (*i.e.* that it authorised, directed or controlled the illegal act) that would have been necessary to found a charge under the anti-bribery provisions. The lead examiners were told of two other cases in which consolidation had opened the path to an action against a US parent corporation.

Accounting

It appeared to the lead examiners that there is relatively little focus among the accounting profession on the FCPA. The vast majority of accountants in the US (some 340 000) are bound by the Code of Ethics of Certified Public Accountants (AICPA), but this refers in general terms to "integrity" and "objectivity" and makes no specific mention either of bribery or of the FCPA. There are mandatory training programs on ethics and independence carried out by the Certified Public Accountants' societies in the different states, but training about fraud is voluntary. In cases where serious sanctions are imposed on individual accountants for breach of professional rules, their publication – already widespread – should be standard practice so as to raise awareness within the profession.

An encouraging development is the progress being made in professional bodies which are working towards harmonisation of international accounting standards. Almost all speakers on the subject of accounting and auditing also commented on the longer-term implications of the unfolding history of the collapse of Enron: as the profession comes to terms with the lessons to be learned, the most likely outcome will be a tendency towards increased scrutiny and stringency in professional standards.

Auditing

The requirement that US public listed companies undergo independent auditing builds a further safeguard into the system of detection and deterrence of FCPA violations. The effectiveness of this is, however, subject to certain caveats. Audits must be conducted in accordance with applicable SEC rules and with Generally Accepted Auditing Standards (GAAS). However, there is a proliferation of standards, statements and guidelines emanating from the AICPA which have created confusion in the minds of the profession as to exactly which standards apply. The recent Statement on Auditing Standards (SAS 95) developed by the AICPA's Auditing Standards Board expressly requires the exercise

of professional judgement on the part of the auditor in applying them. One encouraging development is the AICPA's recent issue of an Exposure Draft, "Proposed Statement on Auditing Standards Consideration of Fraud in a Financial Audit", which specifically includes guidance on the detection of material misstatements arising from fraud, and it is hoped that, if adopted, this will prove helpful.

Under the Securities Exchange Act an auditor has an obligation to report suspected illegal acts to the management of the company, to escalate the matter to the board of directors if appropriate action is not taken, and to report his or her conclusions to the SEC only in the event that the board fails to act and that the illegality is material to the financial statement of the company and would result in a modification to the auditor's report. The lead examiners were concerned that the reporting requirement on auditors is both complicated and subjective. As to materiality, many bribe payments, illegal under the FCPA, might go undetected as the relatively small amounts involved would not be considered "material" to the financial statements of a listed company. Whether or not they are caught will depend on how the audit program is designed. Informal guidance issued by the SEC staff offers some assistance in this respect. Staff Accounting Bulletin No. 99 issued in August 1999 expresses the views of SEC staff that exclusive reliance on quantitative benchmarks is inappropriate, and that materiality must be assessed by reference to all the surrounding circumstances. It states: "Among the considerations that may well render material a quantitatively small misstatement of a financial statement are... whether the misstatement involves concealment of an unlawful transaction."

Further, the requirement for an auditor to report to the SEC only arises if no "appropriate remedial action" has been taken by the board of directors, a test which could be open to a variety of interpretations. There may be cases which altogether escape the notice of the SEC. One senior member of the accounting profession observed that auditors are understandably reluctant to assume the role of first-line "enforcers". Their priority is to preserve an open relationship of disclosure with the client, and an important element of this relationship is the obligation of confidentiality.

As to supervision of auditors, the profession is currently regulated by the SEC, the AICPA and the state accountancy boards who license individuals and firms. Enforcement proceedings are few, but a notable recent instance was the SEC action against Arthur Andersen LLP resulting in a civil penalty of US\$7 million for making materially false and misleading reports and engaging in improper professional conduct in connection with its audits of Waste Management Inc. Initiatives are in place at the SEC to complete the ongoing review of each of the five largest independent auditors' systems for compliance with the rules concerning independence. Further, Transparency International has proposed an annual quality monitoring process to replace the existing peer review system operated by the profession. It is the view of the lead examiners that the effectiveness of the FCPA will most probably be enhanced as a result of upheavals in the auditing profession which have little or nothing to do with the workings of the Act itself.

The major concern of the lead examiners with regard to the accounting and auditing requirements is that they do not apply, as such, to non-issuers. All US corporations are required by federal tax laws to maintain books and records adequate to support deductions claimed in their tax returns. However, companies that are not "issuers" for the purposes of the FCPA are governed by a patchwork of state corporate laws and accounting regulations, as well as by standards applied by the accounting profession. There is no single specified form in which records must be kept. The four examples of state laws provided by the United States showed variations from one state to another, and

a lack of clarity as to the penalties for failing to keep adequate records. This means that there is an entire population of enterprises which falls outside the ambit of the FCPA accounting provisions and of federal auditing requirements, and escapes the controls they impose. Furthermore, the international operations of these enterprises are subject to the legal requirements of their country of incorporation. The applicable rules may not always require consolidation of accounts of the sort which would ensure that records of local transactions would ultimately appear on the US entity's books. While the United States has brought several enforcement actions against non-issuers for violation of the anti-bribery provisions of the FCPA, detection of such violations is unpredictable, at best, in the absence of accounting visibility, and it is not clear, in the view of the lead examiners, to what extent this might undermine the deterrent effect of the FCPA.

Commentary

The lead examiners are mindful of the vital role played by the accounting and auditing requirements in deterring and detecting violations of the FCPA among issuers, as well as in providing alternative legal remedies. This could be enhanced by taking steps to increase the focus on the FCPA among the accounting profession, and by the introduction of clearer auditing standards and more stringent controls over auditors. The lead examiners also invite the United States to consider placing independent auditors under a clear obligation, irrespective of materiality or actions taken by the board of directors, to report to the SEC any finding during an audit which indicates a possible illegal act of bribery, in line with Part V of the 1997 Revised Recommendation on Combating Bribery in International Business Transactions. Most importantly, and despite concerns being raised about which would be the appropriate body to undertake enforcement, due consideration should be given to extending the FCPA books and records provisions, at least to those categories of non-issuers whose international business exceeds a certain level.

Sanctions and the "collateral deterrent" effect

Another deterrent feature of the FCPA is that it prescribes criminal sanctions that can be potentially stiff.³ For criminal violations of the FCPA's anti-bribery provisions, corporations and other business entities are subject to a fine of up to US\$2 million per violation; officers, directors, stockholders, employees, and agents are subject to fine of up to US\$100 000 and/or to imprisonment for up to five years. Furthermore, if the criminal offence causes a pecuniary gain or loss, US law authorises alternative maximum fines equal to the greater of twice the gross gain or twice the gross loss, and fines for individual violators may be increased.

Applicable sentencing guidelines allow courts to increase the criminal penalties for FCPA violations, opening the way to heavy fines and the potential for mandatory incarceration. A point system is used to calculate the penalties under the guidelines, with certain mitigating factors serving to reduce the total number of points. Prior criminal history, efforts to obstruct justice, voluntary co-operation with the investigation, pleading guilty (accepting responsibility), and the size of the company can all affect the potential sanction on a company or an individual one way or the other. In the 1995 *Lockheed* case,

3. Civil penalties in SEC enforcement proceedings show a somewhat different pattern and different considerations apply. See Section C as well as the Annex to this report which contains a table showing sanctions imposed in criminal and civil cases brought under the FCPA in relation to bribery of foreign public officials.

the application of these provisions resulted in a combined fine totalling US\$21.8 million. To date, this is the largest fine ever imposed under the FCPA.

A brief survey of the FCPA criminal prosecutions brought to date and that resulted in convictions under the FCPA or related charges indicates however that most of them have resulted in rather moderate fines for both corporations and individuals, and probation or confinement instead of imprisonment. Between 1977 and 2001, twenty-one companies and twenty-six individuals were convicted for criminal violations of the FCPA. Corporate fines have ranged from US\$1 500 to US\$3.5 million (the agreement by Lockheed in January 1995 to pay a record fine of US\$21.8 million being the only instance in which this range was exceeded). Fines imposed on individuals have ranged from US\$2 500 to US\$309 000. Before the 1994 sentencing of a Lockheed executive and of a General Electric international sales manager to, respectively, 18 and 84 months of imprisonment, no director, officer or employee of a company had gone to jail for an FCPA violation. Since then, two individuals have been sentenced to jail, in *US vs. David H. Mead and Frerik Pluimers* (four months of imprisonment) and in *US vs. Herbert Tannebaum* (one year of imprisonment), both in 1998. The current proposal by the US Sentencing Commission to raise the base level offence to correspond to that of domestic bribery is expected to have an impact in future prosecutions: fines will most probably increase and it is likely that more directors and officers will receive mandatory prison terms for their involvement in bribery. The new base level offence will take effect on 1 November 2002 unless Congress raises objections before that date.

In the view of the examiners, however, there is another factor – the collateral consequences of an FCPA investigation or conviction – that should be taken into account in drawing conclusions from the penalties that have actually been imposed in FCPA cases. For businesses, adverse publicity, investigation, indictment and prosecution may be a more important deterrent than fines or imprisonment. News of an investigation can affect the ability of a company to do business and can prove embarrassing or damaging to relationships in the country where the alleged bribery has occurred. From a public relations standpoint, an allegation of bribery can be disastrous for a company once it emerges in the news media that an FCPA investigation is under way. The potential consequences of any criminal indictment are well illustrated by the ongoing action against Arthur Andersen LLP arising out of the criminal investigation into the affairs of Enron.

Beyond the public relations concerns, the costs in terms of legal fees and management time of having to defend an action are themselves far from negligible. Worse still, in the view of large private companies and their counsel, is the threat of suspension of export privileges, as happened to the Lockheed Corporation in 1994, or the withdrawal of eligibility to bid for government contracts or apply for government programs. A mere indictment for an FCPA violation is grounds for suspension, as happened to the Harris Corporation which was tried – and acquitted – on FCPA charges in 1991. Once an agency bars or suspends a company from federal non-procurement or procurement activities, other agencies in turn are required by the Code of Federal Regulations under its Title 48: "Federal Acquisition Regulations System" to exclude the company. Furthermore, the United States will not provide advocacy assistance unless the company certifies that it and its affiliates have not engaged in bribery of foreign public officials in connection with the matter, and maintain a policy prohibiting such bribery. Corporate violators of the FCPA may also be excluded from participating in trade missions.

Conduct that violates the bribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC §§ 1962-1968 (1998), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract. In *W.S. Kirkpatrick v. Environmental Tectonics*, 110 S. Ct. 701 (1990), the Supreme Court held that the act of state doctrine does not bar a suit alleging that a bribe caused the defendant to win a foreign contract. Violating the FCPA may also invite costly lawsuits. For example, after the Department of Justice had prosecuted a company for bribing officials of Pemex, the national oil company of Mexico, the Mexican company itself filed a major civil action against some eighteen known defendants "and other unknown" conspirators seeking more than US\$45 million in direct damages under the Sherman Act, the Robinson-Patman Act, RICO, and further counts of commercial bribery and fraud.

Taken together, the potential collateral consequences operate as a strong disincentive to having the corporation indicted, let alone contesting the case to trial. There are many compelling reasons for companies to settle with the Department of Justice and the SEC, and this may explain the high percentage of cases which end in plea agreements.⁴ Given the commercial impact of an allegation of an FCPA violation, companies do not have much appetite to take on the risks of going to trial. Indeed, at least one member of the Bar expressed regret that this had resulted in a dearth of judicial decisions in contested cases.

Commentary

The lead examiners are mindful of the deterrent effect of the collateral consequences of an FCPA investigation or conviction. They take the view that it would be misleading to look only at the levels of fines and other sanctions available on the statute book.

The role and utility of corporate compliance programs

An important effect of the FCPA is that it encourages the development of compliance programs. According to one member of the Bar with a specialist FCPA practice, corporate compliance programs are the single most important measure contributing to prevention and deterrence. The lead examiners noted the wealth of material available on the subject, both in print and on the internet, and the emphasis placed on promoting the use of compliance programs not only by in-house counsel and the private Bar, but also by the Department of Justice in its Opinions, the Department of Commerce in its publications, and in the case-law. A relatively recent practice has been the frequent imposition of a compliance program on the defendant corporation as a condition of a plea agreement. Beginning in the *Metcalf and Eddy* matter, the government has required annual certifications directed to the DOJ, and has also required the company itself to conduct a periodic review of its compliance program to ensure that it took into account any changes in the company's organisation and lines of business. In a case involving a

4. In a plea agreement, the defendant agrees to plead guilty, often in exchange for an agreement on sentencing factors which provides greater certainty as to the ultimate sanction and/or a promise by the prosecutor not to seek the maximum penalty allowed by the law. Plea agreements take place within a range prescribed by the sentencing guidelines and are subject to the approval of the trial court. In most instances, the agreement is arranged by experienced and knowledgeable counsel on both sides and is readily approved by the court and the result is a formal finding against the defendant. The practice of plea agreements is widespread among American jurisdictions and seen by the Supreme Court as an essential component of the administration of justice.

violation of the FCPA, the existence of an effective corporate compliance programme is, according to the sentencing guidelines, a mitigating factor.

As described to the lead examiners, the main features of a successful compliance program are strong commitment from senior management in creating and communicating a "compliance culture", regular and thorough training, and consistent enforcement. The components of a compliance program might include internal controls coupled with review by an internal audit committee, implementation of a policy prohibiting discretionary payments, training and familiarisation of employees with the main provisions of the FCPA, a requirement that all employees regularly sign an undertaking to be bound by the corporate conduct policy, and the systematic screening ("due diligence") of the technical capability, background, connections, reputation and financial stability of any potential foreign business partner in order to reduce the likelihood of bribery by an agent for which the company would be liable. Among larger US corporations it is common for the FCPA compliance program to form part of an overall corporate compliance policy which also addresses insider dealing, antitrust and export regulations.

Compliance programs are by now well-developed and well-understood among large public companies, especially those operating in risk-averse industry sectors such as defence procurement, and others involved in government contracting for which there are stringent standards of eligibility and the risk of disbarment. The indirect or collateral damage that would be inflicted on such companies by an indictment for violation of the FCPA of itself operates as a powerful incentive to enforce compliance throughout the entire organisation. Indeed, the lead examiners were told that many larger companies insist on a single world-wide policy which they apply equally to their foreign subsidiaries and their US operations.

The lead examiners were struck by the fact that all the private industry representatives who addressed them on this issue came from major multinational corporations in the defence or telecommunications sectors, where the practice of compliance programs is well-established and there is no shortage of resources – including lawyers – devoted to their implementation. FCPA compliance is an active, and growing, area of practice for the private Bar specialists. Members of law firms who had experience of representing smaller corporate clients commented that resources were less critical than management commitment, and that the instrument was capable of almost infinite adaptation to suit the needs and budget of a variety of businesses. However, the concern remains that such policies are more extensively and intensively taught, understood and implemented within the US than internationally, where the problem of bribery is most likely to arise: one member of the private Bar spoke of the "enormous gap" between enforcement in the US and commitment outside it. A survey by Transparency International of leading practices in corporate governance revealed that companies generally performed less, not more, monitoring activity in their overseas operations than at home. It also found that only 52 per cent of respondents who had codes of conduct had multilingual versions available, and that only 19 per cent rated their code of conduct as extremely effective.

More important, in the view of the lead examiners, is the significant number of small companies operating in the international market – the large majority of SMEs, in the estimation of one Washington lawyer – who do business without a compliance program. The same speaker characterised this situation as "an accident waiting to happen". A lawyer from USAID who addressed the examiners explained that USAID did not deal with contractors who were not conversant with the FCPA, but that he was "amazed" at the number of potential suppliers with no active compliance program. USAID had found

it necessary to provide its own training to over 3 000 such companies, who were operating in an environment of “incredible vulnerability”. This scenario is viewed by the lead examiners as, at the very least, a risk factor which could undermine the effectiveness of the FCPA.

Commentary

The challenge of widening the use of compliance programs in those areas where they are most needed is only one aspect of the issues relating to SMEs and start-ups which will be addressed below. The lead examiners would welcome the commitment of the United States to developing and promoting compliance programs, or guidelines for their design and implementation, specifically tailored to a wider, international, corporate population. Also, in cases where compliance programs are prescribed as a condition of a court-ordered settlement, the inclusion of formal procedures for periodic follow-up or monitoring, such as those recently put in place, is to be welcomed.

The FCPA, small and medium sized enterprises (SMEs) and start-ups

As the lead examiners built up an overall picture during the Phase 2 review of how the FCPA is implemented, a concern emerged with regard to small and medium sized US enterprises (SMEs) and start-ups. For present purposes it is not useful to attempt a precise definition of this term; nor is it possible to estimate their numbers. These companies might be issuers or non-issuers within the meaning of the FCPA; their size makes it likely that most SMEs will fall into the category of non-issuers. The particular problems they face came into sharper focus as a result of the discussions that took place during the on-site visit, which tended to confirm the impression that SMEs are a particularly vulnerable business category whose needs are not adequately addressed by the existing pattern of implementation. Many of the factors discussed in this report which contribute to the effective detection and deterrence of FCPA violations by larger organisations do not have the same impact on SMEs. Their very size – especially in the case of a start-up with severely limited resources – will render them vulnerable. Yet such companies are engaging on an increasing scale in international business, sometimes in countries where bribery is an acknowledged risk. As an illustration of this problem, eighty-two per cent of all US exporters to China in 1997 were SMEs according to US official statistics.

Assuming that most SMEs are non-issuers, while they are subject to the anti-bribery provisions of the FCPA, they are not subject to its bookkeeping and accounting requirements or to the auditing requirements of the Exchange Act, and the SEC has no jurisdiction over them. The safeguards afforded by these regimes in terms of deterrence and detection, which have been discussed earlier in the present report, are not applicable to non-issuer SMEs. Compliance programs, which appear to work so well in major multinationals, are typically less well understood, less developed and inadequately implemented, or often completely absent, among smaller companies with less experience, less awareness and fewer resources. This problem is exacerbated in the foreign operations of SMEs – the very environments in which bribery is most likely to occur and least likely to be detected. The effect which has been described elsewhere in this report as “collateral deterrence” – the damage to the business resulting from an FCPA investigation or indictment – might be expected to be greater in the case of small companies for whom indictment could be tantamount to a corporate death sentence. In reality this is likely to be outweighed by a combination of ignorance and the unlikelihood of bribery ever being uncovered. Nor will all SMEs necessarily have ready access to, or the resources to spend

on, specialist outside counsel, and they are most unlikely to be familiar with the DOJ opinion procedure or well-informed enough to use it.

It is at the level of non-issuer SMEs that the FCPA enforcement system may be at its least effective. For a combination of reasons these companies appear, as it were, to potentially slip through the net. The examiners could not avoid the conclusion that there may be a level of undetected foreign bribery taking place in the international operations of non-issuer SMEs, simply because there are insufficient compliance programs or other systems in place to deter it and insufficient book-keeping, auditing or other control mechanisms in place to detect it.

At this point it is appropriate to draw a distinction between the foreign subsidiaries of US corporations, as a separate category, and SMEs which may do business both inside and outside the United States. The foreign-incorporated subsidiaries of major US multinationals, though not technically subject to the FCPA, are not immune from the special problems of doing business in a foreign environment. However, despite earlier concerns on the part of the examining team, it became apparent during the on-site visit that these entities often benefit via the US parent both from the visibility afforded by the accounting rules and auditing requirements, and from a frequently elaborate compliance program more or less rigorously enforced by corporate headquarters. The US parent has a strong interest in implementing such programs in any foreign entity over which it has effective control. And, at the very least, there will usually be a lawyer at hand, if not to advise in person, then to frame the problem and seek advice from a qualified source: these companies are the very ones who have ready access to, and can afford, the major specialist law firms with developed FCPA practices.

Commentary

The lead examiners invite the United States to consider ways in which the FCPA books and records provisions, currently binding only on issuers, could be extended to apply to those non-issuers whose international business activities exceeds a certain level. Further, the lead examiners would encourage the United States to pursue and reinforce the valuable "outreach" efforts undertaken by the Department of State and Department of Commerce to promote better levels of awareness of the FCPA and the Convention, targeting in particular smaller US enterprises doing business abroad. The Department of Justice has a major role to play here, by exploring what additional forms of guidance it could make available in order to ensure that SMEs and start-ups have access to its wealth of expertise. Those law firms with a significant FCPA practice in the US should ensure that lawyers in their foreign offices are thoroughly versed in the FCPA and able to give direct and relevant advice at local level. Those firms with an existing client base of SMEs are encouraged to extend their ongoing efforts to devise and publicise compliance programs suitably tailored to the needs of smaller companies.

The role of measures to prevent and detect the tax deductibility of bribes

The US regime designed to prevent the tax deductibility of bribes, which exists alongside the FCPA, complements the FCPA in that it provides an additional tool serving both as a deterrent to foreign bribery and a mechanism for its detection. The US has for many years had extensive tax provisions to deal with bribes paid by US companies as well as foreign subsidiaries of US companies. The principle of non-deductibility is found in Section 162(c)(1) of the Internal Revenue Code, disallowing deductions for illegal payments to officials or employees of any government. There are two exceptions: facilitation payments and payments that are legal under the local law of a foreign

jurisdiction may be deducted for tax purposes. The Treasury has the burden of proving by clear and convincing evidence that a payment is unlawful under the FCPA. However in case the taxpayer claims that the payment is a facilitation payment or is legal under the laws of the foreign country the burden of proof is shifted to the taxpayer.

With respect to foreign subsidiaries, under the subpart F provisions of the Internal Revenue Code, the anti-deferral rules apply to subpart F income, which includes any illegal bribes, kickbacks, or other payments (for which a tax deduction would be denied under provisions relating to illegal payments) paid by or on behalf of a Controlled Foreign Corporation to an official, employee, or "agent in fact" of a government (Internal Revenue Code §952(a)(4)). In addition, the earnings and profits of any corporation paying a foreign bribe that is not deductible (such as payments that would be unlawful under the Foreign Corrupt Practices Act if paid to a US person) are not to be reduced by the amount paid as a bribe. Pursuant to Section 941 IRC, "qualifying foreign trade income" is subject to favourable tax treatment. Under regulations prescribed by the Secretary of Treasury the "qualifying foreign trade income" does not include any illegal bribe kickback or other payment within the meaning of section 162 (c) paid by or on behalf of the taxpayer directly or indirectly to an official, employee, or "agent in fact" of a government.

Overall the lead examiners found that the United States has comprehensive tax provisions concerning the non tax deductibility of bribes to foreign public officials. It also addresses the issue of the payment of bribes by Controlled Foreign Corporations.

Specific issue related to bribes detected when a taxpayer has requested an advance pricing agreement

An Advance Pricing Agreement (APA) is an arrangement that allows for the determination in advance of the methodology to be used in setting inter-company transfer pricing in transactions between related parties. It requires negotiations between the taxpayer and one or more tax administrations. The taxpayer has to submit documentation to support the methodology presented to the tax administration. The examiners typically involved in an APA case are familiar with those issues and have received training, although no specific training on the subject of illegal bribes. If the APA group within the IRS has information that indicates an illegal bribe (or any criminal act) may have occurred, it will refer the information to the appropriate division. APA will not treat information regarding a criminal act in the same way that it treats other non-factual information received, i.e., the information regarding a criminal act would be referred internally, and APA would not seek to protect its use in non-APA proceedings.

Specific issues related to bribes paid by Controlled Foreign Corporations

Turning to Controlled Foreign Corporations (CFC) legislation, both the IRS and the private sector indicated that it was difficult in practice to identify bribes paid by CFCs. Examiners basically rely on risk analysis and they have the possibility to request headquarters to perform a tax examination abroad which also makes it easier to get information on the foreign tax treatment of bribes. The representatives from the private sector stressed the importance of the internal policies and codes of conduct of companies as a deterrent to bribery, especially where local managers in subsidiaries are bound to the same standards as managers of the parent company.

The role of measures to prevent money laundering

The US regime designed to prevent money laundering, which exists alongside the FCPA, is a further complement in that it, too, provides an additional tool serving both as a deterrent to foreign bribery and a mechanism for its detection. Several changes have taken place to reinforce the existing legislation with the enactment of the Patriot Act on 26 October 2001 in response to the events of 11 September 2001. Significantly, provision is now made for Regulations prescribing the minimum standards for customer identification at the opening of an account by "financial institutions", which term is understood to be broadly defined. Money transmitting agencies are now covered by anti-money laundering obligations. Additionally, securities companies and broker dealers will be made subject to anti-money laundering obligations during 2002. Casinos will be brought within the scope of the anti-money laundering regime, but it is understood that this will not take place before 2003. Insurance companies are understood not to be covered by suspicious activity reporting obligations.

The Patriot Act also provides for the prohibition of correspondent accounts in the US with foreign banks that have no physical presence and makes provision for enhanced "due diligence" procedures both for correspondent banking and for private banking. Minimum standards for private banking will include ascertaining the identity of the nominal and beneficial owners, and the source of funds. These provisions are to be brought into force by Regulations under the Act later this year. The content of the Regulations was still under discussion at the time of the on-site visit. Similarly, provision is made for the prevention of indirect services to foreign shell banks. The Secretary of the Treasury has the power to make Regulations to delineate "the reasonable steps necessary" to comply with this requirement, and the content of these Regulations is in the process of being drafted.

Another significant development, in the view of the examining team, is the imposition of new obligations on financial institutions to more closely scrutinise the accounts of foreign political figures as a result of issuance of guidelines last year and the enactment of the Patriot Act. In January 2001, the Treasury Department, as part of a multi-governmental agency task force, issued guidelines on enhanced scrutiny of transactions that might involve proceeds of foreign official bribery. The guidelines impose new responsibilities on financial institutions to stop or refrain from doing business with senior political officials unless they demonstrate the legality of what they are doing. Open accounts for such officials, and their immediate families or close associates who have the authority to conduct business on behalf of those officials, are to be scrutinised, and banks are to be proactive in informed compliance with respect to these types of accounts. Although the guidelines are not a federal law or a rule and thus it is not mandatory for an institution to comply, since the enactment of the Patriot Act financial institutions are now required to "conduct enhanced scrutiny of any such account that is requested or maintained by, or on behalf of, a senior foreign political figure that is reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption."

§ 5322 of Title 31 of the US Code, which provides for criminal and civil penalties in respect of the statutory obligation for domestic financial institutions to keep records of, and report on, "monetary instrument transactions", builds a further safeguard into the system of detection and deterrence. This provision is however understood to cover only wilful failure to make suspicious activity reports (SARS) or currency transaction reports. Although there have been few criminal prosecutions to date for failure to report, the lead

examiners were told that some actions against financial institutions were currently under consideration as there is a growing understanding that more criminal prosecutions in this area would enhance the anti-money laundering regime. Full information about the level of penalties for failure to report suspicious activity does not appear to be available. However, from what the lead examiners saw in respect of prosecutions against financial institutions regarding failure to report suspicious activity, the monetary penalties imposed do not appear themselves to be very dissuasive.

Overall, the changes signalled in the Patriot Act appear to be significant steps in the deterrence and detection of foreign bribery. The concern remains however that many businesses – other than the corporations covered as issuers by the FCPA – appear not to have a general obligation to maintain books and records sufficient to enable them to comply with requests from the competent authorities to reconstruct domestic transactions for investigative purposes, as required by FATF Recommendation No. 12. There appears to be power in the Patriot Act for the Secretary of the Treasury to make Regulations for record keeping and reporting of transactions primarily involving foreign jurisdictions. How wide this power is or how it may be implemented, and whether it will apply generally to medium range corporations conducting foreign business, was however unclear at the time of the on-site visit.

Commentary

The examiners encourage the US authorities, in appropriate cases, to consider bringing more criminal prosecutions for failure to report suspicious activity, in order to underline the importance of complying with the reporting regime. Further consideration might also be given to criminalising negligent failure to report, given that the present “willful” “mens rea” standard places a high evidentiary burden on the prosecutor. The lead examiners further encourage the US authorities to compile the relevant statistical information for the purpose of a future assessment.

Mechanisms for the Prosecution of Foreign Bribery Offences and the Related Accounting and Money Laundering Offences

1. Prosecution of Foreign Bribery

Working of the main enforcement agencies: the SEC and DOJ

Enforcement by the SEC

Enforcement responsibilities of the FCPA are divided between the Department of Justice and the SEC. The Department of Justice is responsible for all criminal enforcement of the FCPA provisions and for civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of both the anti-bribery and accounting provisions with respect to issuers. Generally speaking, it is the SEC that enforces the record-keeping and accounting provisions of the FCPA, while the DOJ enforces the anti-bribery part. In practice, the SEC enforces the laws against entities under its jurisdiction, including those requiring companies to file appropriate proxy statements and make appropriate disclosures. If, in the course of that enforcement, the SEC considers that the company has done something that amounts to an FCPA violation, it will add that count as an additional ground upon which to prosecute the company.

When the FCPA was enacted in 1977, the accounting and record-keeping provisions of the FCPA were incorporated into the Securities Exchange Act of 1934, thus making these standards part of the law applicable to all issuers, whether or not they have involvement with any transnational deals or with any foreign officials that could possibly be bribed. As a result, the majority of cases involving the FCPA accounting and record-keeping standards as incorporated into the Securities Exchange Act of 1934 do not have a transnational bribery component. They instead frequently involve various other schemes by which corporate employees or senior executives commit accounting fraud. However, after a hiatus of nearly ten years during which almost none of the cases brought under the accounting and record-keeping provisions of the FCPA involved bribery, the SEC prosecuted four such cases with a bribery component in relatively quick succession in 2000-2001.¹ Considering that there had been only seven such cases prior to 2000, many of the leading practitioners in the white-collar crime field stated during the on-site visit that they expect the pressure to continue as the US seeks international implementation of the OECD Convention.

As indicated above, the SEC does have authority, which it has used on occasion, to take civil action against a company solely on the basis of a violation of the anti-bribery provisions of the FCPA. These cases are quite rare: the SEC had sought injunctions under section 30A, the anti-bribery provision of the Securities Exchange Act, on five occasions by 2002.² For example, in the *Katy Industries* case (1978), although there were some books-and-records elements, the SEC's primary focus was on the allegations that Katy,

1. See *SEC v. International Business Machines, Corp.* (D.D.C. 2000); *In the Matter of American Bank Note Holographics, Inc.* (2001); *United States and SEC v. KPMG-Siddharta Siddharta & Harsono and Sonny Harsono* (1999); *SEC v. Chiquita Brands International, Inc.* (D.D.C. 2001).

2. See *SEC v. Katy Indus., Inc.* (N.D. 1978), *SEC v. Sam P. Wallace Co., Inc.* (D.D.C. 1981), *SEC v. Ashland Oil, Inc.* (D.D.C. 1986), *SEC v. Triton Energy Corp.*, (D.D.C. 1997) and *United States and SEC v. KPMG-Siddharta Siddharta & Harsono and Sonny Harsono* (1999).

who employed a consultant in connection with an oil-production sharing contract who was a close friend of an Indonesian government official, knew or had reason to know that payments made to the consultant would be passed on to the official.

The relevant standard for SEC enforcement is set forth in the authoritative speech made in 1981 by then Chairman Harold Williams of the SEC. Seeking to defuse business concerns that the accounting provisions of the FCPA could result in inadvertent violations, the Chairman stated that "The goal [of the Commission] is to allow a business, acting in good faith, to comply with the Act's accounting provisions in an innovative and cost effective way and with a better sense of its legal responsibilities... No system of adequate records and controls – no matter how effectively devised or conscientiously applied – could be expected to prevent all mistaken and improper dispositions of assets". He concluded that penalising inadvertent record-keeping violations is not the primary goal of the SEC. When the SEC encounters accounting problems that do not involve improper payments, it typically seeks an injunction that orders the company to comply with the accounting and record-keeping requirements of the federal securities laws.

Commentary

The lead examiners were encouraged by the stronger degree of focus now placed by the SEC on prosecuting substantive violations of the FCPA. However, in the absence of any recent definitive statements, there is a certain lack of transparency surrounding the prosecution policy and priorities applied within the organisation. This, coupled with the recent high levels of staff turnover at the SEC, might in time undermine the consistency and effectiveness of its vital role in the enforcement of the FCPA.

Enforcement by the DOJ

Since the enactment of the FCPA, the Department of Justice has brought a relative small number of enforcement actions and these typically allege violations of Sections § 78dd-1 and § 78dd-2 of the FCPA (i.e. corrupt payments by an issuer or domestic concern): approximately 32 criminal prosecutions and seven civil enforcement actions have been brought by the DOJ under the anti-bribery provisions of the FCPA. Only in a few cases has the Department of Justice brought prosecutions for violations of the accounting and record-keeping provisions, aside from its role in prosecuting violations of the bribery provisions of the FCPA. Cases not involving bribery include *United States v. Duquette* (D. Conn 1984), *United States v. Lewis* (S.D.N.Y. 1988), *United States v. UNC/Lear Services* (W.D. Ky. 2000) and *United States v. Daniel Rothrock* (W.D. Tex. 2001). Since only some thirty separate alleged bribery schemes have been prosecuted during 25 years under the FCPA, it is difficult to draw broad conclusions about enforcement. There are no statistics or other information available which would reveal the number of allegations received, the number of investigations commenced, terminated or abandoned, or that might shed light on the reasons which led to decisions not to proceed.

Despite the relatively few prosecutions over the past 25 years the continuing commitment by the DOJ to prosecute bribery cases was readily apparent to the examining team during the on-site visit. It is further borne out by the willingness to use the opportunity to prosecute corporations for violations of the FCPA, recognising, in the words of the guidelines for prosecutors, that the prosecution of corporations provides "a unique opportunity for deterrence on a massive scale".

In 1994, criminal enforcement of FCPA violations was centralised under the sole overall control of the Criminal Division Fraud Section, in order to achieve consistency in the way such cases were handled. It has also ensured that a cadre of highly trained FCPA prosecutors is available to lead the prosecution team in each case. This is especially important for prosecutions conducted in federal courts outside the capital, where local Assistant US Attorneys will have the benefit of working on each occasion with an experienced specialist.

As to resources, the Fraud Section consists of approximately sixty attorneys. Eleven were working on FCPA cases at the time of the on-site visit, many of whom were handling non-FCPA cases as well. Others with relevant expertise are also available. The examining team was told that FCPA cases are given priority when allocating staff, and that steps are taken to ensure that younger attorneys have exposure to the FCPA. Prosecutorial expertise has been developed through regular training in complex white-collar crime prosecution techniques. The cohesiveness of the Fraud Section has benefited from a low level of staff turn-over. The Fraud Section's budget is large enough to permit travel to judicial districts around the country as well as international travel to gather evidence. The lead examiners were told by DOJ officials that they had never had to drop a case concerning a potential FCPA violation because of lack of human or financial resources.

The situation with regard to enforcement priorities is less clear. DOJ prosecutors told the examining team that, despite suggestions to the contrary in the prosecutors' manual detailing principles of prosecution, there were in fact no established priorities within the DOJ which determined which cases they chose to pursue. Generally, the DOJ, in deciding to charge a company or individuals, will weigh, above all other considerations, the sufficiency of the evidence and the likelihood of winning the case. It follows that the principal standard for indictment applied by Fraud Section prosecutors across the board is whether the prosecutor believes, on the basis of the evidence, that the defendants will be convicted.

However, the picture is somewhat clouded by the existence of an early statement of prosecution priorities which appears to run counter to the firmly-held position of the present prosecutors. In November 1979, not long after the FCPA came into force, a public statement was made by the then Assistant Attorney General, Mr. Philip Heymann, of the "enforcement priorities" to be applied by the Department of Justice with respect to the anti-bribery provisions of the FCPA. In it, he identified a number of factors that "increase the likelihood" of investigation or prosecution, including *i)* the making of prohibited payments or gifts in countries where the only other competitors are American companies; *ii)* situations in which there are no American competitors, but an American company is the only company engaging in corrupt practices; and *iii)* the fact that a foreign nation is making an effort to eliminate corrupt practices. Other circumstances identified as affecting the likelihood of prosecution were: the size of the payment; the size of the transaction; the past conduct of the persons or entities involved; the involvement of senior management officials; and the strength of the available evidence.

The Heymann statement of FCPA prosecution priorities was made over twenty years ago, at a time when there had been few significant FCPA prosecutions, and in a context that pre-dated the negotiation and implementation of the OECD Convention. However, at the time it was made it carried the weight of authority, and it is still referred to among

members of the Bar.³ The lead examiners note that it has never been formally rebutted or superseded by a clear statement of the criteria which now govern the choice of which cases are pursued. Representatives of the DOJ told the examining team that each bribery allegation is evaluated primarily on the quality and quantity of evidence that is available, and the likelihood of a conviction if the matter were presented to a court, and that the only reason for the US to decline a prosecution is lack of sufficient or available evidence. A statement to this effect to a wider public could serve as timely clarification of what is, at the present time, the view of the DOJ as to enforcement priorities.

The strong overall impression gained by the lead examiners was that the system for criminal prosecution of FCPA violations appears to be working well. However, its present successful functioning would seem to be, perhaps, too dependent on subjective criteria which have little objective structural framework to back them up. In the absence of a clear statement of current prosecution priorities, the examining team had only the assurances of the present prosecutors. The same concern could be expressed with regard to questions as to how allegations of FCPA violations are received and processed, why investigations are launched and why some are discontinued, how expertise is shared and transmitted within the department, and how interaction with other agencies, especially the SEC, is handled (see, below, the section on inter-agency co-operation). As noted earlier in this report, there is an almost complete absence of internal statistics as to how allegations are processed, and thus few tools to facilitate case management analysis, internal auditing and assessment of budget needs.

As long as the present team of dedicated and experienced prosecutors remains in place, the lead examiners are confident that the system of enforcement of the FCPA by the Fraud Section should continue to function well. But as a matter of organisational principle and accountability, there are inherent dangers in allowing a situation to develop where the bulk of the intellectual capital of a prosecuting unit – not simply in terms of expertise, but, more critically, in terms of detailed, long-term institutional memory – resides in a small team of specialists and is not underpinned by objective statistics, documentation or process.

Commentary

The lead examiners invite the United States to state publicly its current enforcement priorities with regard to the FCPA in the light of the OECD Convention. The examiners also invite the United States to consider what techniques, whether in the form of policy statements, internal practice guidelines, statistics or otherwise, might be used in order to capture, secure and maintain, in a suitably objective and visible form, the wealth of institutional memory and expertise with regard to FCPA prosecution that is currently available in the team of Fraud Section prosecutors, in order to reinforce the organisational infrastructure necessary to carry on the fight against corruption, and to ensure continuity.

Inter-agency co-operation

The prosecution of the anti-bribery and record-keeping provisions of FCPA depends in large measure on communication, co-operation and exchange of information between the different government agencies. Because the FCPA covers such a broad spectrum of

3. See Donald R. Craver, *Complying With the Foreign Corrupt Practices Act. A Guide for US Firms Doing Business in the International Market Place* (Chicago, Illinois: American Bar Association, 1999), p. 61.

activities, the government potentially confronts complex enforcement problems and issues of jurisdiction. As noted earlier, the FCPA divides enforcement responsibilities between the Department of Justice and the SEC.

The DOJ and SEC, as a result of their overlapping jurisdiction, co-operate and share information where possible. The SEC routinely passes any information to the DOJ that is not actual work product generated in the course of an investigation. The DOJ does likewise. In fact, in *SEC v. Dresser Industries, Inc.* (D.C. Cir. 1980), the US Court of Appeals for the District of Columbia Circuit held that the SEC and the Department of Justice were unconstrained in sharing the fruits of their investigation "at the earliest stage of any investigation". The exception is where it has been necessary to empanel a federal grand jury, in a matter prosecuted by the DOJ. Evidence given to the grand jury is subject to strict confidentiality and cannot be shared with other agencies, except where the DOJ obtains a court order permitting disclosure. The commencement of a grand jury investigation does not restrict the SEC from furnishing information or evidence to the DOJ. In other cases, the DOJ may, and does, invite the SEC to participate in joint witness examinations.

Forms of co-operation between DOJ and the SEC also occur in dealing with foreign prosecutors and foreign authorities to whom the DOJ and the SEC must go in order to obtain evidence located overseas. The SEC has worked out arrangements to obtain and share information with criminal authorities in some countries. However, in others, the SEC must rely on mutual legal assistance treaties and agreements that exist between the Department of Justice and other foreign criminal authorities; in these situations, the DOJ usually attempts to obtain the co-operation of the foreign authorities, e.g., by trying to secure their agreement that it may share with the SEC information obtained in the course of an investigation. Co-ordination may also occur in bringing an action, as happened in the *American Banknote Holographics, Inc.* case in 2001 where the filing of a major SEC financial fraud action that included allegations of foreign bribery was co-ordinated with criminal charges filed by the Department of Justice.

It became clear during the course of the on-site visit that the extent of the co-operation between the DOJ and the SEC goes well beyond what is suggested by the fact that the two agencies have only brought one joint formal action, in the *Baker Hughes* case. However, the lead examiners remarked that this interaction is largely informal, is not supported by any documented process, guidelines, or memorandum of understanding, and depends heavily on the long-standing personal relationships that have grown up over years of working together. In meeting with representatives from the SEC, they noted that there was some lack of awareness of the published statement of policy in which the SEC stated its intention to refrain from pursuing an investigation in a case where the DOJ had given a positive opinion through its Opinion Procedure. The informal nature of these inter-agency exchanges may be contrasted with the existence, according to the SEC's 2001 Annual Report, of over 30 Formal Information Sharing Agreements between the SEC and its foreign counterparts. Some of the processes employed in international co-operation might, in the view of the lead examiners, usefully be adapted to serve in the domestic sphere.

All the representatives from the different government agencies, including tax authorities, who addressed the examining team said they would, and do, report any suspected FCPA violations to the DOJ, but they admitted that this was based on the general duty incumbent on all federal employees to report suspected crimes, and not on any statutory or documented reporting requirements. It appears that, apart from the formal

obligation on the FBI to refer all foreign bribery cases to the DOJ, reporting is done on an informal, *ad hoc* basis and there is no underlying inter-agency procedure such as memoranda of understanding, either between the DOJ and the SEC or between the DOJ and any of the other agencies. The DOJ has explained that the FCPA, though important, carries no special status and that its enforcement must be viewed in the context of the general practice of the agencies concerned with respect to any criminal violations. This, in the view of the lead examiners, fails to take into account one important dimension of the enforcement effort: that, since the OECD Convention, FCPA enforcement has become a matter of international, as well as domestic, obligation. Indeed, the examiners were informed that an informal inter-agency group has been put in place to evaluate the implementation of the anti-bribery legislation adopted by the other Parties to the OECD Convention.

Commentary

The lead examiners noted that there are no clear, documented, formal processes between agencies to underpin the vital exchange of information and reporting of suspected violations, and a corresponding absence of statistics. This results in a lack of transparency and of data, which, if captured, could serve useful analytical purposes in reviewing the workings of the FCPA. It is suggested that the efficiency of inter-agency co-operation might be enhanced by the introduction of clearer processes, while acknowledging that the US does not favour the use of formal guidelines for this purpose. Further, the overall system might benefit from the creation of a mechanism to periodically review the process of FCPA enforcement from prevention to prosecution. Such mechanism, without forming part of the decision-making function, could provide the means to identify criteria for demonstrating objectively that the system is working, and to identify where in the enforcement system there is a need for meaningful statistics to be kept.

Mechanisms for gathering evidence located abroad

FCPA investigations and proceedings on both the criminal and the civil side often depend on evidence that is located overseas. In almost every situation that the Department of Justice has examined, it has found that much, if not almost all, the critical evidence lay outside the jurisdiction of the United States. This means that effective co-operation with foreign prosecutors and foreign authorities is crucial.

Although the DOJ and the SEC appear to be well-practised in availing themselves of mutual legal assistance under existing bilateral treaties, SEC Formal Information Sharing Agreements, memoranda of understanding and enforcement contacts overseas, the chief difficulty in investigating and prosecuting foreign bribery cases has until now been the lack of co-operation in obtaining evidence located outside the United States. In some instances, to overcome a perceived lack of mutuality or the absence of a Mutual Legal Assistance Treaty, the Department of Justice has developed so-called "Lockheed Agreements", or Mutual Legal Assistance Agreements (MLAAs), which are case-specific. Nevertheless, although some countries, *e.g.* Niger and Syria, have provided access to witnesses and extradited defendants, other countries have not provided evidence for use in FCPA prosecutions, citing lack of mutuality. The United States has also encountered problems of dual criminality when attempting to obtain evidence from foreign financial institutions. For instance, in the *US v. General Electric Company* case (Cr. No. 1-92-87, S.D. Ohio 1992), the Swiss government, which at the time had no foreign bribery law, declined to provide evidence, citing the lack of dual criminality; the

United States revised its request and its grounds of prosecution to focus on a related fraud upon the US government involving the non-disclosure of “commissions” paid by the company, and the Swiss government provided the evidence for use in a prosecution of that offence. Since the signing and subsequent ratification of the OECD Convention by some of these countries, mutuality has become less of an issue, although it is clearly still relevant when seeking evidence from countries which are not Parties to the Convention.

The Convention is indeed seen as opening up new sources of evidence to both the US Department of Justice and the Securities and Exchange Commission in their efforts to enforce the FCPA, as the Convention requires signatories to provide “prompt and effective legal assistance” to each other for the purpose of criminal and civil proceedings (Article 9). As law enforcement co-operation under the OECD Convention is now expanding, the ability to gather evidence from abroad is increasing. According to the DOJ authorities, the result of the adoption of the OECD Convention by 35 countries is an increasing ability of US prosecutors to obtain from foreign authorities business records, bank records, and testimonies from companies and individuals located overseas. With Parties to the Convention, the United States will likely be able to extradite those who are wanted for violations of the FCPA, any requirement of dual criminality will be satisfied, and it will be able to obtain evidence without much impediment.

The US government is also increasingly willing to bring bribes to the attention of other Parties to the Convention. Not only is the United States exerting substantial pressure to encourage other Parties to bring anti-bribery cases, but the Department of Justice is now increasingly using Article 9 of the Convention to provide evidence to law enforcement authorities of other Parties to the Convention regarding the bribery of foreign officials. When the Department of Justice becomes aware of credible information indicating that a foreign company has violated another country's foreign bribery law, it will usually provide that information to foreign law enforcement agencies. This is done through a variety of channels, including spontaneous transmissions under bilateral or multilateral assistance treaties or through law enforcement contacts overseas. The Government has established for this purpose a working group consisting of representatives from the Departments of State, Commerce and Justice, and other agencies, to ensure that all complaints of misconduct by foreign companies, regardless of which agency initially receives the report, are passed to the Department of Justice for possible referral to foreign law enforcement agencies.

Statute of limitations

The FCPA's anti-bribery provisions contain no period of limitations for criminal actions. As a result, the general five-year federal limitation period provided by 18 USC para. 3282 applies for the filing of an indictment. The period can be extended for up to three years, upon a request by a prosecutor and upon a finding by a court that additional time is needed to gather evidence located abroad. However, the period is not suspended by any act of investigation prior to the indictment.

In response to concerns expressed about the shortness of the limitation period under US federal law by comparison with those applicable in some other Parties to the Convention, the lead examiners were told by the DOJ prosecutors that, in cases where foreign evidence was likely to be needed to support an indictment under the FCPA, it was the automatic practice at the outset to file a motion seeking a three-year extension to the five-year limitation period. Such an extension is invariably granted as it is not discretionary. Indeed, in ruling on an application to extend or toll the statute of

limitations, a court need not make any finding as to the importance of the evidence to the prosecution's case. The statute requires only that the court find two elements: that the prosecution has made an official request and that it appears that evidence is, or was, in a foreign country. The statute is silent on whether the court needs to determine that the evidence is material, substantial, or otherwise important.

The Department of Justice went on to point out that, in practice, bribes are usually paid in instalments, which prolongs the time when the last act in furtherance of the bribe was committed, which is the date from which the limitation period starts to run. According to the DOJ, the limitation period has never, so far, proved an obstacle to bringing an indictment. While no prosecutor will risk filing an indictment in the absence of sufficient evidence to secure a conviction, the time available has, to date, been sufficient to allow the indictment to go forward. Interestingly, the DOJ prosecutors recalled that the defence has been known to enter into an agreement with the DOJ to toll the statute of limitations, thereby waiving the right to raise the statute as a bar to any subsequent prosecution, in order to avoid the risk of an imminent indictment where the deadline is looming, and to avoid the collateral consequences that would result. The DOJ prosecutors did however concede that the five-year period could "conceivably" give rise to problems in the future.

Commentary

The length and modalities of statutes of limitations have been identified in Phase I as a generic problem for many signatories of the Convention. The lead examiners noted the DOJ assurances that the relatively short limitation period for the filing of an indictment has not, to date, presented problems in practice in the US. However, there is no basis on which this situation can be monitored or verified in the absence of any statistical data about how prosecution cases under the FCPA are prepared, and of what types of evidentiary difficulty most commonly arise. With the increased sophistication of the techniques deployed in paying and concealing bribes, the possibility that evidence might remain concealed for several years is obvious, and this could impact the effectiveness of enforcement of the legislation.

Elements of the offence

As noted earlier, there are few litigated cases – civil or criminal – which test the outer limits of the FCPA or resolve questions about the relationship between "improper advantage" and "obtaining or retaining business", the treatment of payments to third party beneficiaries, the exercise of nationality jurisdiction, the interstate nexus requirement, or the scope of the definition of a "foreign public official". Many of these were explored in the Phase I Review but continue to give rise to uncertainty, mostly because their effect has not yet been tested in court decisions, with the exception of the FCPA language concerning "obtaining or retaining business".

"Obtaining or retaining business"

Influencing governmental decisions raises potential FCPA issues. For example, if a US company pays foreign officials in order to obtain a reduction in customs duties or taxes, is there an FCPA violation? This question implicates one of the key elements of an FCPA violation, the business purpose test. Under the statute, the ultimate objective of a corrupt payment must be to obtain, retain or direct business to any person. It has been

argued among the Bar that an attempt to influence general governmental decisions is too removed from the obtaining of business to be covered by the FCPA.

Congress focused on this ambiguity in its debate on the 1988 FCPA amendments. The final language specifically rejected a House proposal that would have prohibited payments to procure "legislative, judicial, regulatory or other action in seeking more favourable treatment by a foreign government", although the conference report stated that the FCPA prohibits corrupt payments for the "carrying out of existing business, such as for... obtaining more favourable tax treatment. See, e.g., the *United Brands* case". (In the pre-FCPA *United Brands* case, there had been bribery of a Honduran minister to obtain a reduction in a general export tax that would benefit the US company. The SEC obtained a consent injunction based on failure to disclose the bribes in the company's reports, and the case was an important factor leading to the enactment of the FCPA.) The 1998 Amendments to comply with the OECD Convention did little to clarify the issue. Article 1 of the Convention prohibits bribery of a foreign public official "in order to obtain or retain business or other improper advantage in the conduct of international business". But Congress did not insert the "improper advantage" language of the Convention as an alternative to the "obtain or retain business" provision of the FCPA; instead Congress added the "improper advantage" language into the clause of the statute setting out the alternative types of *quid pro quo* covered by the FCPA. In other words, the law prohibits the making of payments to a foreign official for purposes of: "...i) influencing any act or decision of such foreign official in his official capacity, ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or iii) securing any improper advantage... in order to assist [such person] in obtaining or retaining business for or with, or directing business to, any person".

Congress inserted the "any improper advantage" language in the *quid pro quo* element apparently because US enforcement officials were reluctant to modify the "obtaining or retaining business" element of the FCPA, which they have always contended is to be construed broadly, as indicated, for example, by the Complaint and Undertakings in *Sec v. Triton Energy Corp.* (D.D.C. Feb. 27, 1997) or by the government's arguments in *US v David Kay and Douglas Murphy* (Ap. 16, 2002).

The risk that the language of the FCPA might prove ambiguous, and that it could be interpreted to produce an offence narrower in scope than that envisaged by the Convention, was raised at the time of the Phase I Review and has been confirmed by the decision of 16 April 2002 in *US v David Kay and Douglas Murphy*, in which the US District Court of the Southern District of Texas favoured the narrower interpretation. That court – whose decision is not binding on any other court in the United States – ordered the dismissal of criminal charges under the FCPA on the grounds that payments made by the defendants to a customs official in Haiti in order to obtain a reduction in customs duties did not constitute payments made for the purpose of "obtaining or retaining business". The court found – rejecting the prosecution argument in favour of a broad interpretation – that, both in 1988 and at the time of the relevant amendment in 1998, Congress had "considered and rejected statutory language that would broaden the scope of the FCPA to cover the conduct in question". The United States has filed a Notice of Appeal in this matter, and further developments will be kept under review as the monitoring process goes forward.

The same issue has arisen in *SEC v Mattson*, an unrelated civil case pending before the same court. The SEC has alleged that two former officers of Baker Hughes Incorporation violated the anti-bribery provisions of the FCPA by authorising an

Indonesian entity controlled by Baker Hughes to make an illicit payment to a local tax official in exchange for a promise to reduce the Indonesian entity's tax assessment. The defendants have argued that the expression "obtaining or retaining business" does not encompass payments made to obtain a reduced tax assessment. Whatever the outcome in this second case, the examiners note that the historically broad interpretation favoured by the DOJ and the SEC, which would conform with the requirements of the Convention, has now been called into question by a district court.

Interstate nexus requirement

The Act requires, in the case of "issuers" and "domestic concerns", or their agents, who bribe within the US, that there be an element of interstate commerce. Generally, this includes trade, commerce, transportation, or communication among the states, or between any foreign country and a state or between any state and any place or ship outside of the state. This requirement, which is known as the "interstate nexus" requirement, does not apply to non-US nationals and businesses bribing in the US, or to US nationals and businesses bribing abroad, as in such cases there is, by definition, an element of international commerce. The OECD Working Group on Bribery identified the "interstate nexus" requirement in Phase 1 as a potential evidentiary problem in a case where a bribe is offered in person.

In the view of the US authorities there is no serious difficulty in meeting the "interstate nexus" requirement: the interstate nexus can be as slight as a single letter, fax, cable, phone call, or airline ticket, in the furtherance of the effort to make a prohibited payment. In *San P. Wallace Co.* (D.P.R. 1983), for instance, the mailing of checks was deemed "uses of means and instrumentalities of interstate commerce, that is, interstate and foreign bank processing channels". In *United States v. Harry G. Carpenter* (Criminal Information No. 85-353 1985), a Western Union international telex was cited as the use of a means and instrumentality of interstate commerce for the purposes of the FCPA. In *United States v. Reitz* (W.D. Mo. 2001), the plea stated that in furtherance of the bribery act the defendant and other conspirators corresponded via e-mail and facsimile transmission and engaged in numerous telephone conversations. The lead examiners were told by the US authorities that in all these cases, which were settled by plea agreement, the government was required to proffer proof of the interstate nexus before the court would accept the plea agreement and enter a judgement of conviction. For those cases that proceeded to trial, the government also proved the existence of an interstate nexus. For instance, in *US v. Mead* (D.N.J. 1998), the requisite interstate nexus was proven by the use of emails and international travel.

There has been however at least one instance where the prosecution was not able to proffer proof of the interstate nexus. In *SEC v. Montedison* (D.D.C. 1996), the SEC did not charge the company with a violation of the FCPA's anti-bribery provisions as "the complaint did not allege that Montedison used the mails or any means or instrumentality of interstate commerce in furtherance of bribing a foreign public official" under the FCPA.⁴ The SEC filed a civil injunctive action charging Montedison, an Italian corporation listed on the New York Stock Exchange, with committing financial fraud by falsifying documents to hide bribes totalling nearly US\$400 million. It would also appear that in at least two other, hypothetical, cases the "interstate nexus" requirement might not

4. See Arthur Aronoff, Senior Counsel for International Trade and Finance in Antibribery Provisions of the FCPA (<http://www.ita.doc.gov/legal/fcpa.html>).

be satisfied, as recognised by DOJ and SEC attorneys: when an e-mail is not sent until long after a bribe has been paid even where it discusses the now-completed bribe, and in the case when a private mail carrier is used, if it does not cross state lines and does not qualify as an “interstate facility”. The United States’ view is however that, even in such instances, it would be highly unlikely that the bribery of a foreign official could have been accomplished without some use of another interstate facility.

Payments to third party beneficiaries

Another area of uncertainty is the situation where a benefit is directed to a third party by a foreign public official. The FCPA does not expressly cover the situation and there are no cases supporting the contention of the US that it would be covered in practice. In Phase 1, the Working Group was concerned about the lack of clarity in this regard and recommended that this issue be re-examined in Phase 2. In *US v. Kenny* (US Dist. Ct., 1979) the personal representative of the Prime Minister of the Cook Islands solicited a payment for the benefit of the Cook Islands Party (of which he was the leader) in order to ensure renewal of Kenny International’s stamp distribution agreement with the government. Instead of prosecuting the case as one in which the benefit was directed to a third party (the Cook Islands Party) by a foreign public official (the Prime Minister), the Department of Justice chose to proceed under the political party provision. However, it is not clear from the plea agreement that the political party influenced the Prime Minister.

Definition of “foreign public official”

A “foreign public official” is defined quite broadly by the FCPA and includes “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government, department, agency or instrumentality”. By contrast with Article 1 of the OECD Convention, the definition of “foreign public official” in the FCPA does not mention persons holding judicial office in a foreign country. In Phase 1, the US authorities stated that, nevertheless, the definition would cover judges. Although there are no cases addressing this issue, this remained the position of the Department of Justice prosecutors at the time of the Phase 2 on-site visit.

Another area of potential uncertainty under the FCPA involves officials of public enterprises. Such enterprises are covered in US law as “instrumentalities”, making their officers, directors, employees, etc., “foreign officials” under the FCPA. Neither the statute nor its history define the term “instrumentality”, thus leaving it to US companies to determine whether an enterprise is an instrumentality or not. This can be difficult in some cases. For instance, are “instrumentalities” only enterprises that are wholly or majority-owned by the foreign government? Does the term “instrumentality” cover enterprises that are controlled by the government, or entities in the process of privatisation? While other US laws may contain some clues to a possible definition, most are however in the domestic context and thus may be of limited relevance. For instance, the Foreign Sovereign Immunities Act (FSIA) defines an agency or instrumentality of a foreign state as an entity, “a majority of whose shares or other ownership interest is owned by a foreign state or political division”.

The examining team was provided with examples of FCPA enforcement actions where bribes were paid to officials of state-owned oil companies, state-owned bus companies, utilities commissions, state-owned trading companies, state-owned banks and tax authorities. However these cases do not reveal whether, in conformity with

Commentary 14 on the Convention, the FCPA applies where there is indirect foreign control of the enterprise in question, or in the case where the foreign government exercises *de facto* control over an enterprise, but does not, for example, hold in excess of 50 per cent of the voting shares. In Phase I, the DOJ explained that among the factors that it considers are the foreign state's own characterisation of the enterprise and its employees and the degree of control exercised over the enterprise by the foreign government. The DOJ has favoured a broad interpretation and has treated entities owned or controlled by a foreign government as "instrumentalities" of the foreign government.

Nationality jurisdiction

The FCPA establishes nationality jurisdiction over "issuers" and "any United States person" under provisions entitled "alternative jurisdiction". The US authorities believe that the FCPA also covers acts by a US agent on behalf of a domestic concern, *i.e.* a non-issuer, and acts by a US person acting abroad on behalf of a foreign company. It remains however unclear at this stage whether in practice the nationality jurisdiction established by the 1998 amendments to the FCPA will be interpreted as covering the two situations, as the US has not yet brought prosecutions in such circumstances.

Absence of sanctions

Whether sanctions are available in practice under the FCPA for persons who are "domestic concerns" (*i.e.* US nationals) and have not bribed on behalf of a "domestic concern" or an "issuer" remains unclear, as no penalties, criminal or civil, are prescribed by the FCPA for this type of situation. In other words, if a US national bribes a foreign public official on his or her own behalf and is not acting as an agent, sanctions are not provided, although the act is still an offence. According to the US authorities, it is highly unlikely that this fact pattern would occur, given the broad definition of "domestic concern". There are however no litigated cases that deal with this question.

Use of other statutes

The US authorities who addressed the examining team explained that potential lacunae in the offences in the FCPA can usually be compensated for by filing indictments under different statutes. They explained that, for instance, the Mail Fraud Statute, Wire Fraud Statute, Interstate and Foreign Travel or Transportation in aid of Racketeering Enterprises Act (ITAR) and RICO have been used in addition to the FCPA to address foreign bribery. It would appear, however, that these statutes would only partly supplement the potential lacunae in the FCPA as they are not themselves comprehensive in their application to foreign bribery. For instance, these statutes import a different *mens rea* from that required under the offences in the FCPA (*e.g.* the Mail and Wire Fraud statutes require a fraudulent intent). Moreover, these statutes do not appear to provide for nationality jurisdiction.

Commentary

The present definition of the offence of bribery under the FCPA has been recently interpreted by a court as requiring that the acts be done for the purpose of "obtaining or retaining business", and that seeking to obtain an improper advantage is not of itself an alternative ground for indictment. That decision is under appeal. If it were upheld, the result would be to exclude from the scope of the offence any illicit payment which is directed to securing some advantage – such as favourable tax or

customs treatment – to which a company is not clearly entitled. Such an interpretation would be narrower than that prescribed by the Convention. The DOJ has confirmed that the United States will consider amendments to the FCPA to clarify that it is an offence to offer, promise or give a bribe “in order to obtain or retain business or other improper advantage in the conduct of international business”.

As regards the other areas of potential uncertainty identified above in the offences under the FCPA, the lead examiners recommend that these be kept under review as the case law develops. In particular, the need to prove an “interstate nexus” in respect of US nationals and companies is of some concern given that nationality jurisdiction (which does not require this element) has as yet not been tested. Also, for the reasons given above, reliance on other statutes may not always be sufficient to complement the FCPA in these areas.

Interpretation of exceptions and defences

The FCPA provides one exception that permits “facilitation payments” to foreign public officials and two affirmative defences to possible violations. A great deal of compliance counselling under the FCPA involves the interpretation of these exceptions and defences, which did not appear in the original FCPA but were introduced in 1988. As a result they were discussed at length during the on-site visit.

The facilitation payments exception

The language in the FCPA, which excludes from the definition of bribery those payments which are necessary to facilitate the performance of routine administrative actions, is not limited to “small” facilitation payments as in the Convention. It should be further noted that this exception is not provided for in the statute governing domestic bribery (18 USC § 201). To the extent that the exception is open to interpretation, it may be regarded as an area of risk and open to misuse as noted in Phase 1 evaluation of the United States.

There is an absence of any clear, published guidance as to what the words mean and where the limits are. The Act contains no *per se* limit on the size of the payment, focusing instead on the purpose of the payment. No court has interpreted the application of this exception and there are no settled cases to assist in delineating the boundary between acceptable and unacceptable payments. There are also no relevant DOJ Opinions. If a company asks the DOJ for informal advice or reports a payment, the lead examiners were told that the DOJ will sometimes determine straight away, on the basis of judgement and experience, whether it falls within the exception and if so, take no further action. This operates as a sort of informal, undocumented “*de minimis*” rule.

Companies have developed different strategies to deal with facilitation payments. At least one major company interviewed imposes a policy, applicable world-wide, that irrespective of the existence of the exception, no discretionary payments are to be made without express approval, as a way of reducing the scope for misjudgement by local employees. The high level of concern was also demonstrated by another in-house counsel, who said that when teaching the FCPA he carefully omits all reference to the existence of the exception.

Commentary

The lead examiners suggest that there may be a case for guidance to be issued by the DOJ to explain the tests it applies in practice to assist in the interpretation

of this exception. Alternatively, consideration should be given to amending the wording of the statute to clarify, for the benefit of all, that only minor payments are allowable.

The affirmative defence of "reasonable and bona fide expenditure"

Travel and lodging expenditures on behalf of foreign officials are another recurring difficulty for companies and US nationals dealing with foreign officials. Unlike the OECD Convention, where there is no express provision allowing for the payment of non-excessive expenses, the FCPA permits the payment of reasonable and *bona fide* expenses to enable foreign officials to learn about the host company or in direct relation to the "execution or performance of a contract". The view of the DOJ is that the defence neither derogates from the strict requirements of the FCPA nor undermines that statute's compliance with the Convention: rather, it amplifies the *mens rea* requirement that is common to all laws implementing the Convention, that of corrupt intent. However, to the extent that the language of the defence is open to interpretation, it is regarded by companies and in-house counsel who spoke to the examining team as an area potentially open to abuse.

This exception is in a certain sense not a true affirmative defence because it cannot, by definition, apply where the basic elements of the offence of bribery have been met. As suggested by the legislative history of this provision and confirmed by the DOJ to the team of examiners, it only allows reasonable and *bona fide* promotional payments where no corrupt intent is present. Thus the test is one of distinguishing truly corrupt payments provided to obtain or retain business, from legitimate promotional expenses involving no corrupt intent. In 1981, for example, the DOJ approved a proposal by an American manufacturer of packaged meat to provide samples of its products to officials of the Soviet Government agency responsible for procurement of such products. The DOJ noted that the purpose of the sample was to allow for inspection and testing and that the value of the sample was small relative to the value of the potential contract.

Yet, sensitive cases may arise when companies plan promotional tours for visiting foreign officials and include recreational activities in the agenda. Although the DOJ, through its opinion release procedure, has approved promotional trips on several occasions, including payments for the entertainment of a foreign official and his wife, it has not commented on the nature or cost of the entertainment: these opinions suggest only that the DOJ recognises the business purpose of including some entertainment in promotional activities. Nor has any court interpreted the application of the defence. The *Metcalf and Eddy* case (S.D. Ohio, 1998), in which the Department of Justice interpreted the provision of airfare, travel expenses, and pocket money to an Egyptian official and his family during business trips to the United States as exceeding the legitimate levels for *bona fide* promotional expenses, suggests only that the DOJ would allow such expenses where the level of the expense is reasonable and the payments are accurately documented and subject to audit.

In addition to promotional activities, *bona fide* expenditures directly related to the "execution or performance of a contract with a foreign government or agency" may also be a difficult issue for companies. DOJ opinions related to this provision include the approval of a proposal by a US business to bring French officials to the United States to show them a plant similar to the one proposed for construction in France, and the approval of a proposal by an American petroleum company to provide training to employees of a foreign government, where that training was required by local law. In

neither case, however, does the Opinion Release reveal what tests or standards were applied by the DOJ in deciding not to take any enforcement action.

That there is concern as to what the words mean and where the limits are, is demonstrated by the fact that considerable corporate resources are devoted to seeking counsel's opinion on this issue. In-house and outside counsel have chosen to proceed with caution when interpreting the provision, advising companies to act "reasonably", i.e. to ensure that the provision of airfare, travel expenses, accommodation, per diems, samples, recreational activities, etc. is incidental to the promotional purpose of the activity and is reasonable and not extravagant. As this is not a true affirmative defence – because it does not apply where the mental element of the bribery offence has been established and, as such, is already inherent in the wording of the statute – at least one in-house counsel questioned whether this defence serves any useful purpose.

Commentary

The lead examiners are of the view that the defence is not legally necessary and that the scope it allows for interpretation introduces some uncertainty. If it is maintained, the lead examiners suggest that there is a case for guidelines or guidance to be issued by the DOJ to explain in more detail the tests it applies in practice and to assist in the interpretation of the defence.

The affirmative defence of "lawfulness under the written laws of the foreign country"

The FCPA provides that it shall be an affirmative defence that the payment, gift, or offer of payment was "lawful under the written laws and regulations of the foreign official's country". This seemingly broad defence leaves open the issue of what is "lawful" under the written laws of a country. The defence was introduced into the FCPA when it was amended in 1988, with the intention of "codifying" previous DOJ practice as evidenced by a series of Review Letters issued to companies who had raised the question under the then-existing review procedure. An examination of several of these review releases dating from the 1980s shows that the language most frequently used by the DOJ in explaining its decision not to take enforcement action was that the conduct in question did "not violate" or was "not in violation of" the local law. This does little to resolve the ambiguity. Nor is the Department of State in a position to provide specific guidance. Its brochure, "Fighting Global Corruption – Business Risk Management", produced in consultation with the other government departments concerned, says, at page 28 of the current edition, "Whether a payment was lawful under the written laws of a foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilising the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment."

In practice, companies and their counsel have avoided using this defence in seeking to escape liability: the DOJ prosecutors were not aware of any FCPA prosecution in which it had been raised. There might be several reasons for this. It would be rare for a country's law to sanction such payments even where bribery is commonplace. No one who discussed this defence with the examining team could identify a country whose written laws permit bribery of its government officials. Also, particularly in the case of some developing countries where laws might be in a state of flux, to rely on constantly changing and uncertain local laws, even with the benefit of local counsel's opinion, would be extremely risky for the company. Indeed, the amount of legal debate generated around this defence appears to be out of all proportion to its actual use.

2. Prosecution of Money Laundering

Foreign official bribery became a specified foreign predicate offence for a money laundering violation in the United States with the enactment of the Patriot Act on October 26, 2001. Nevertheless, prior to that date, the United States had mechanisms in place to prosecute the laundering of foreign official bribery. The addition of bribery of a foreign public official and misappropriation of public funds as a foreign predicate offence for money laundering in the United States has clarified the ability of US law to combat money laundering in such cases.

There appear, at present, to be few on-going money laundering cases involving foreign bribery, though it is clear that the money laundering/confiscation aspects of foreign bribery cases would be pursued by investigators in cases where there were thought to be available assets. The United States has had a system to confiscate criminal proceeds of many offences that includes criminal forfeiture, civil in rem forfeiture, and administrative forfeiture proceedings. In 2000, the proceeds of money laundering predicate offences, including the FCPA, became directly forfeitable, where previously a separate money laundering transaction needed to be shown. In addition, in 2001, foreign bribery offences became money laundering predicates and thus the proceeds of such offences became directly forfeitable. In accordance with US constitutional principles, confiscation of proceeds ordinarily is only available in respect of offences committed after the relevant changes to the forfeiture legislation came into effect. However, in limited circumstances, United States courts have applied forfeiture retroactively prior to the date of enactment of the statute where the individual had no legitimate right to the property. At the time of the on-site visit the examiners were not advised of any restraint proceedings which had as yet been taken in a foreign bribery case with a view to the eventual confiscation of assets. The examiners were assured that the reason for this was the lack of available assets in such cases and not unwillingness to use the restraint provisions. Since then, the United States has obtained a forfeiture judgement of nearly US\$16 million in restrained assets of Victor Alberto Venero, an associate of Vladimiro Montesinos.

Most money laundering prosecutions have been brought so far under US Code § 1956. The offences thereunder are based on a wide-ranging list of predicate offences. The predicate offences can be proved in money laundering proceedings by independent evidence and it is understood that a conviction for the predicate offence is not required. However, in the absence of clear statistics that break down the types of money laundering prosecutions brought in the USA, it appears anecdotally that a large majority of money laundering cases are brought as part of the same proceedings as prosecutions for the underlying criminality. It was thus unclear to the examining team how many "stand-alone" money laundering prosecutions take place against professional launderers, acting on behalf of others.

Recommendations

In conclusion, based on the findings of the Working Group with respect to the United States' application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to the United States. In addition, the Working Group recommends that certain issues be revisited as the case-law continues to develop.

Recommendations

Recommendations for ensuring effective measures for preventing and detecting foreign Bribery

With respect to awareness raising to promote the implementation of the FCPA, the Working Group recommends that the United States:

- 1) Enhance existing efforts to reach small and medium sized enterprises doing business internationally, both in order to raise the level of their awareness of the FCPA and to equip them with tools and information which are specifically tailored to their needs and resources (Revised Recommendation, Article 1).
- 2) Undertake further public awareness activities for the purpose of increasing the level of awareness of the FCPA in the accounting profession (Revised Recommendation, Article 1).

With respect to other preventive measures, the Working Group recommends that the United States, based on the expertise built up during years of applying and interpreting the FCPA:

- 3) Consider issuing public guidance, whether as guidelines or otherwise, suitable to assist businesses in complying with the FCPA generally, and in particular to equip them with risk management tools useful in structuring international transactions (Revised Recommendation, Article 1).
- 4) Consider developing specific guidance in relation to the facilitation payments exception (Convention, Commentary 9; Phase I Evaluation, paragraph 1.3).
- 5) With respect to the defence of reasonable and *bona fide* expenditure, there were questions raised concerning the need for this defence. If it is to be maintained, the Working Group recommends that appropriate guidance be provided (Phase I Evaluation, paragraph 1.3).

The Working Group further recommends that the United States:

- 6) Encourage the development and adoption of compliance programs tailored to the needs of SMEs doing business internationally [Revised Recommendation, Article V. C (i)].
- 7) Consider making the books and records provisions of the FCPA applicable to certain non-issuers based on the level of foreign business they transact, so as to possibly improve the level of deterrence and detection of FCPA violations (Convention, Article 8; Revised Recommendation, Article V).

With respect to detection, the Working Group recommends that the United States:

- 8) Advocate clarification of auditing standards especially as to materiality, and strengthen controls over auditors in order to enhance the detection of foreign bribery (Convention, Article 8; Revised Recommendation, Article V).
- 9) Undertake to maintain statistics as to the number, sources and subsequent processing of allegations of FCPA violations in order to put in place measures to enhance the capabilities of the United States in detecting foreign bribery (Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 6).

Recommendations for ensuring adequate mechanisms for the effective prosecution of foreign bribery offences and the related accounting and money laundering offences

The Working Group recommends that the United States:

- 10) Make a clear public statement, in the light of the OECD Convention, identifying the criteria applied in determining the priorities both of the Department of Justice and of the Securities and Exchange Commission in prosecuting FCPA cases. (Convention, Article 5)
- 11) Enhance the existing organisational enforcement infrastructure by setting up a mechanism, including the compilation of relevant statistics, for the periodic review and evaluation of the overall FCPA enforcement effort (Convention, Article 5).
- 12) Consider whether more focus should be given to criminal prosecutions in the framework of anti-money laundering legislation for failure to report suspicious activity, to enhance the overall effectiveness of the FCPA (Convention, Article 7).
- 13) Consider whether the statute of limitations applicable to the offence of bribery of a foreign public official, as well as to other criminal offences involving the obtaining of evidence located abroad, allows for an adequate period of time for the investigation and prosecution of the offence, and if necessary, take steps to secure an appropriate increase in the period (Convention, Article 6).
- 14) Consider amendments to the FCPA to clarify that it is an offence to offer, promise or give a bribe "in order to obtain or retain business or other improper advantage in the conduct of international business" (Convention, Article 1; Phase 1 Evaluation, paragraph 1.4).

Follow-up by the Working Group

The Working Group will follow up the issues below, as the case-law continues to develop, to examine:

- 15) Whether amendments are required to the FCPA to supplement or clarify the existing language defining the elements of the offence of foreign bribery with regard to *i)* cases where a benefit is directed to a third party by a foreign official; and *ii)* the scope of the definition of a "foreign public official", in particular with respect to persons holding judicial office and the directors, officers and employees of state-controlled enterprises or instrumentalities (Convention, Article 1; Phase 1 Evaluation, paragraphs 1.2).

- 16) Whether the current basis for nationality jurisdiction, as established by the 1998 amendments to the FCPA, is effective in the fight against bribery of foreign public officials (Convention, Article 4).

The Working Group will furthermore monitor developments in the following area:

- 17) Whether, by November 2002, the base level offence classification of foreign bribery for sentencing purposes has been increased so that penalties are comparable to those applicable to domestic bribery (Convention, Article 3; Phase 1 Evaluation, paragraph 2.1).

*ANNEX:*¹**Cases Relating to Bribery of Foreign Public Officials
Under the Foreign Corrupt Practices Act of 1977
(1977-2002)**

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1. The information contained in this annex is based on the "Digest of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1997" as of 31 January 2002 (Danforth Newcomb, Partner, Shearman & Sterling, New York, 2002), as provided to the Secretariat by the United States. The information has been up-date by the Secretariat in consultation with the United States to cover the period January-July 2002.

Section 1: Foreign bribery criminal prosecutions under the FCPA

#	Date	Case	Charges against legal persons					Charges against natural persons				
			Fines	Restitution or Forfeiture	Production (years)	Other sanctions	Other crimes charged	Fines	Restitution or Forfeiture	Imprisonment (years)	Production (years)	Other sanctions
1	1979	US v. Kerry Int'l Corp.	\$50 000	NO-357000 (F)	-	Permanent injunction against further FCPA violations	-	Chairman	-	-	-	Permanent injunction against further FCPA violations, cooperation agreement with foreign government (Cook Ill.)
2	1982	US v. Crawford Enterprises Inc.	\$3 400 000	-	-	-	Conspiracy, aiding, abetting	President + owner (CE) Exec. Vice President Intermediary Sub-director (and wife) Sub-director (purchase) Intermediary (bribe) Vice President of sub-contractor of Seller	\$309 000 \$150 000 \$75 000 \$5 000 \$5 000 -	-	-	Conspiracy, aiding, abetting ditto ditto ditto ditto ditto ditto

			Charges against legal persons				Charges against natural persons							
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitution or Forfeiture	Imprisonment (years)	Probation (years)	Other sanctions	Other crimes charged
								Regional Manager of division of seller	-	-	1 (suspension, modified to probation)	-	-	Conspiracy, forgery and altering (charges apply to this)
6	1992	US v Apple Prosees Products Overseas Inc, US v Gary Borenstein	\$5 000	-	-	Cooperation agreement, permanent injunction against further violation of FCPA	see individual C&Ss	President, sole stockholder	-	-	-	3	Cooperation agreement, permanent injunction against further violations of FCPA, \$250 000 civil penalty, \$300 000 civil law payments, \$5 000 prosecution costs	CFR 11A in connection with bribery schemes (charges apply to this)
7	1983	US v Santo V Wallace Co, US v Alfonso A Rodriguez	\$30 000	-	-	-	CFR 11A (fines \$500 000), SEC action	President	\$10 000	-	-	3	-	-

#	Date	Case	Charges against legal persons				Charges against natural persons							
			Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitution or Forfeiture	Imprisonment (years)	Probation (years)	Other sanctions	Other crimes charged
8	1985 1990	US v. Ray G. Caputer and WGS Holdings, Inc. v. Caputer Financial Services Capital U.S. Holdings and Co. Inc.	\$75,000	-	-	-	-	Former Chairman of Board, Chief Exec. Officer	\$10,000	-	suspended	3	community service work	-
9	1985	US v. Silemon Contractors Inc.	\$150,000	-	-	Permanent injunction against further FCPA violations	-	3 officers	N/A	N/A	N/A	N/A	Permanent injunction against further FCPA violations	-
10	1989 1991	US v. Napco Int'l Inc. and Versant Corp., US v. Lurbo	\$205,000 (aggregated fine for 3 charges of which 1 court on basis of bribery of foreign official)	-	-	\$140,000 settlement of civil liability, \$75,000 settlement of civil tax liability	Multi-object company to defraud the U.S. government of false tax return	Vice President IN RELATED CASE	-	-	1.5 suspended	3 of which 60 days home confinement	600 hrs community service work	false statements
11	1989	US v. Goodyear Int'l Corp.	\$250,000	-	-	-	-	None	-	-	-	-	-	-

Charges against legal persons				Charges against natural persons										
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitution or Forfeiture	Imprisonment (years)	Probation (years)	Other sanctions	Other crimes charged
12	1983	US v. Joseph Paul Alfred G. Dunn and Jose Quensch	no corp charged					President, sole shareholder	N/A	N/A	N/A	N/A	N/A	Conspiracy to violate FCPA
								Intermediary	light					ditto
								Intermediary	acquitted					ditto
13	1980-1984	US v. Young, Abshire v. Young and Rubicam Inc.	\$500,000	-	-	-	Conspiracy (charges apply to this), FICO violations, perjury, SS alleged racketeering acts	Dismissed						
14	1990-1991	US v. Mann; US v. Bonds et al; US v. Eagle Bus; US v. Cook et al		-	-	Quid pro quo, transportation violation/FCPA	See individuals	Canadian agent of seller	-		-	3	-	Conspiracy to violate FCPA (other persons not charged)
								2 Canadian officials dismissed (FCPA not applicable to foreign officials)						
								Company officer not charged						

			Charges against legal persons					Charges against natural persons						
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitution or Forfeiture	Imprisonment (years)	Probation (years)	Other sanctions	Other crimes charged
15	1990	US v. G.M. Resources (P) and Thomas Chalmers	\$15,000 (jointly with individual)	\$100,000 (P)	-	Cooperation agreement	Conspiracy to violate FCPA (charges apply to firm)	President, sales and administrative	\$70,000 (jointly with corp.)	-	-	6	Cooperation agreement	Conspiracy to violate FCPA (charges apply to firm)
16	1990	US v. Harn Corp.	acquitted	-	-	-	Conspiracy, false books and records, aiding and abetting	Vice President	acquitted	-	-	-	-	Conspiracy, false books and records, aiding and abetting
17	1994	US v. Shandor et al.	OE \$20,000 (jointly with individual)	-	-	-	Filing of false claims (charges apply to firm)	VP sales manager of GE	-	\$1,741,453 (P)	7	-	-	Conspiracy, wire fraud, ML, charges apply to firm)
18	1990	US v. Wham Corp., US v. Hershberg	Natural Person: \$200,000 (jointly with individual) \$175,000 total	-	-	-	Related charges (charges apply to firm)	Foreign official	highway	-	-	-	-	Conspiracy to obstruct US trade, obstruct justice, wire fraud, ML
19	1994	US v. Lockheed Corp., US v. Low, US v. Nester	\$21.1 m (alternative fine previously)	-	-	Cooperation agreement	Conspiracy to violate FCPA (charges apply to firm), conspiracy to obstruct justice	Intermediary	highway	-	-	-	-	obstruct justice
								President, Chief Executive Officer, sales and administrative	\$2,000	-	-	2	-	
								Reg. Vice president, Lockheed Ltd	-	-	1.5	-	-	

Charges against legal persons				Charges against natural persons										
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitution or Forfeiture	Imprisonment (years)	Probation (years)	Other sanctions	Other crimes charged
							defendant US gov. foreign bribery, funds programs	Sales director Lockheed Advanced-Off IN RELATED CASE	\$40,000			-		perjury
20	1998	US v. Symbion North America Inc., US Symbion Inc., US v. David H. Black, US v. Frank Purnell	\$15 m	-	5 each	\$600 spec. assessment, programs and co. programs and co. with Dab etc.	Data falsification (US 4 imp., 6 years prob., \$600 spec. assessment), conspiracy to defraud, conspiracy to violate FCPA, wire fraud	President, Chief Executive Officer, Executive Vice President	\$20,000		0-23	3	4 month home detention	conspiracy to violate FCPA, use of facility in foreign country, conspiracy to defraud, conspiracy to violate FCPA, wire fraud
21	1988	US v. Helmut Thurnwald	no corp. charged					Chairman of Board of Directors	Fugitive, extradition, indictment decision on appeal					defraud
21	1988	US v. Helmut Thurnwald	no corp. charged					President	\$10,000		1	-	-	Conspiracy to violate FCPA (charges apply to this)
22	1988	US v. Control Systems Specialist Inc., US v. Donald Richard Orlina	\$1,500		1			President	\$50 (Pina agreement)	complete restitution	unspecified, modified into probation	3	\$100 for bribery of US (pub. off., 150 hrs. community service, work, cooperation agreement DOJ)	conspiracy to violate FCPA, bribery of US (pub. off.)

			Charges against legal persons					Charges against natural persons						
Case #	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitution or Forfeiture	Imprisonment (years)	Probation (years)	Other sanctions	Other crimes charged
	23/1999	US v. Int'l Mineral Solutions Corp. and Donald K. Qualey	\$1,000	-	1	-	Conspiracy to violate FCPA	President	\$5,000	-	-	3	4 months home confinement, 50 hrs community service work	Conspiracy to violate FCPA
	24/2001	US v. Conitor	No corp. charged	-	-	-	-	Former Exec. Vice President, GM, later President and Director	Pending	pending	pending	Pending	pending	pending
	25/2001	US v. David Ray Hallbrook	no corp. charged	-	-	-	-	Vice President	-	-	-	1	\$100 spec. assessment	-
	26/2001	US v. R. K. Holland, US v. A.F. Reitz, US v. P.R. King, US v. P.B. Hernandez	No corp. charged	-	-	-	-	Stockholder, Chief Financial Officer	Pending	pending	pending	pending	pending	Compliance to violate FCPA (< charges apply to this), Tax evasion
								Vice President, secretary, employee, stockholder	Pending	pending	pending	pending	pending	Compliance to violate FCPA (charges apply to this), state and federal felonies to assist agent, shareholder and felonies to assist in that felonies to
								Stockholder Officer	Restitution on conspiracy and FCPA violation expected in	Restitution on conspiracy and FCPA violation expected in	Restitution on conspiracy and FCPA violation expected in	Restitution on conspiracy and FCPA violation expected in	Restitution on conspiracy and FCPA violation expected in	Trust, Act (deception), Trust, Act of (deception)

#	Date	Case	Charges against legal persons					Charges against natural persons				
			Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Fines	Restitution or Forfeiture	Imprisonment (years)	Probation (years)	Other sanctions
								Sept. 02	Sept. 02	Sept. 02	Sept. 02	Sept. 02
								Sept. 02	Sept. 02			14 months imprisonment to return the US
												also
27	2001	US v David Kay	No corp charges					Punitive				
								Charged with espionage				
								also				
28	2002	US v Sangster						Punitive	14 months imprisonment	pending		pending

Section 2: Foreign Bribery Civil Actions Instituted by the Department of Justice under the FCPA

#	Charges against legal persons			Charges against natural persons				
	Date	Case	Fines	Other sanctions	Other crimes charged	Position	Sanctions	Other crimes charged
1	1979	US v Carter et al.	no costs charged			Officer shareholder	Permanent injunction prohibiting future violations of FCPA	-
2	1980	US v Dornier GmbH	-	Permanent injunction against future FCPA violations	-	Officer shareholder	none	-
3	1983	US v American Totalizer Co	-	Permanent injunction against future FCPA violations	-	none	none	-
4	1989	US v Metcalf and Eddy	\$400,000	\$50,000 investigation costs, implement specified compliance program, implement financial and accounting controls, promptly investigate and report alleged FCPA violations in the future, include in future joint venture agreement representation and undertaking by each partner as to FCPA matters, 5 years annual audits and compliance certificate as to FCPA matters, periodic reviews at least every 5 years of the FCPA policies and programs, cooperate with a further investigation, permanently enjoined from FCPA violations				

Section 3: SEC Actions Relating To Foreign Bribery

#	Date	Case	Charges against legal persons			Charges against natural persons		
			Fines	Other sanctions	Other crimes charged	Position	Fines	Sanctions
1	1978	SEC v. Page Amways Inc.	-	Permanent injunction prohibiting future violations of FCPA	-	6 officers and 6 directors	charges dismissed	
2	1978	SEC v. Kaly Indus Inc.	-	Consent judgments. Permanent injunction prohibiting future violations of FCPA, amendment of filing, establishment of Special Review Committee of outside directors to report to the BOD	-	2 directors	-	Consent judgments. Permanent injunction prohibiting future violations of FCPA
3	1979	SEC v. IAT Systems and Controls Corp	-	Permanent injunction against future violations of FCPA, Amendment of filing, appointment of Audit Committee and Special Agent	-	2 officers	-	Permanent injunction against future violations of the FCPA
4	1980	SEC v. Texaco Petroleum Corp.	-	Permanent injunction against future violations of FCPA, appointment of new director, keeping of accurate books and records	-	none		
5	1981	SEC v. Samp' Whelan Co.	-	Permanent injunction against future violations of FCPA, establishment of independent committee of the BOD to conduct an internal investigation and report to SEC	-	none		
6	1986 1987 1988	SEC v. Ashland Oil Inc.; Howes v. Adams, Williams v. Hill	-	Permanent injunction prohibiting the corporation from using corporate funds for unlawful pool contributions or other similar unlawful purposes	-	Chairman and Chief Exec. Officer	-	Permanent injunction prohibiting the corporation from using corporate funds for unlawful pool contributions or other similar unlawful purposes
7	1996	SEC v. Montedison S.P.A.	N/A	N/A	Financial fraud, Violation of corp reporting, books and records, internal control sections of SEC Act 1934	none		

#	Date	Case	Charges against legal persons		Other crimes charged	Charges against natural persons		
			Fines	Other sanctions		Position	Fines	Sanctions
9	1997	SEC v. Trilon Energy Corp.	\$300 000 civil penalty	Injunction against future violations	-	Former senior officer	\$25 000 civil penalty	Injunction against future violations
						Former senior officer	N/A	N/A
						A former Executive	-	Cease and desist order regarding them causing further violations
10	2000	SEC v. BNY Corporation	\$300 000 civil fine	Cease and desist order as to the book and records provision		None		
11	2001	SEC v. Weissman, Gertler, Gertler and Gertler, SEC v. Weissman, Gertler, Gertler and Gertler, SEC v. American Bank Note-Photoprints Inc.	\$75 000 civil penalty	Order requiring the company to cease and desist from committing or causing any violations, and any future violations, of the FCPA, and other accounting controls in the SEC proceedings; permanently restrain them from violating the anti-fraud, periodic reporting, record keeping and internal control provisions of the federal securities laws.		"Certain officials not directly involved"	-	Civil actions, permanent restraint orders prohibiting violations of antifraud periods reporting, record keeping, internal control and filing to auditors provisions of the federal securities laws and injunctions restraining them from appearing or participating in any way in the SEC proceedings or purchasing before the Commission or accounts.
11	2001	SEC v. KPMG-SBH, SEC v. Eric L. Mattison and James W. Harris	-	Permanently enjoined from violating and aiding and abetting the violation of the anti-bribery provisions of the FCPA and the internal controls and books and records provisions of the Exchange Act, Cease and desist order re to the internal controls and books and records provisions of the Exchange Act.		2 Execs, Officers	\$25 000 civil penalty each	Permanently enjoined and enjoined from violating and aiding and abetting violations of the antifraud provisions of the federal securities laws and filing to auditors provisions of the federal securities laws.
12	2001	SEC v. Cheyenne Brands Int'l, Inc.	\$100 000 civil penalty	Cease and desist order for violating the FCPA books and records and internal accounting controls provisions		none		
13	2002	SEC v. BellSouth Corporation	None	Cease and desist order for violating the FCPA books and records and internal accounting controls provisions		none		

APPENDIX I

**Evaluation of the United States by the OECD Working Group
(April 1999)**

Legal Framework

Evaluation of the United States¹

General Remarks

The Working Group thanks the United States' authorities for the comprehensive and informative nature of their responses, which significantly assisted in the evaluation process. The relevant US legislation, namely the Foreign Corrupt Practices Act (FCPA), as amended, was initially enacted in 1977. The United States should be commended for its substantial and sustained contribution to this initiative against corruption in international business transactions, and for its prompt implementation of the Convention through amendments to the FCPA, which entered into force on November 10, 1998. Generally, the FCPA implements the standards set by the Convention in a detailed and comprehensive manner. The formulation of the statute is structured and practical in its scope and applicability. The Working Group noted that there are a few areas that may require clarification. Some of the issues identified may be a product of the style of legislative drafting in the United States. The Working Group recommended that those areas and problems identified might benefit from further discussion during Phase 2 of the evaluation process.

Specific Issues

1. The offence of bribery of foreign public officials

1.1. Interstate nexus requirement

As a result of the 1998 amendment, a significantly larger range of persons is subject to criminal penalties under the FCPA than was the case previously. However, the net is cast wider when the offence occurs outside the US territory, and when carried out by a foreign person or business in US territory, in terms of one element of the offence (use of interstate means or instrumentality for US companies and nationals while in the US vs. any act in the US for foreign companies and nationals). The US authorities explained that the difference in treatment is due to the limited legislative power granted to the federal government under the Constitution. As a result, the primary basis for most criminal statutes is the interstate federal commerce clause (*i.e.* the power to "regulate commerce with foreign Nations and among the several states"). This interstate commerce nexus is satisfied for non-US nationals and businesses when they enter the US to take an action in furtherance of a bribe overseas, because they are necessarily acting in international commerce. Although the United States does not believe that this will result in an uneven application of the legislation due to its expansive interpretation of the interstate commerce nexus, the Working Group noted that the interstate nexus requirement might create a problem of evidence when a bribe is offered in person.

1.2. To a foreign official, for that official, or for a third party

The FCPA prohibits payments of "anything of value" to foreign public officials. The United States has explained that "anything of value" encompasses both tangible and intangible benefits. The ability to designate a third party as the beneficiary of the benefit, however intangible that benefit might be, is also considered a benefit to the foreign public

1. This evaluation was completed by the Working Group on Bribery in April 1999.

official and is sufficient for the purpose of the FCPA. The Working Group is however concerned that the FCPA does not specifically state that a payment to a third party at the foreign official's direction is prohibited by the statute and would like to re-examine this issue in Phase 2 of the evaluation process.

1.3. *Affirmative defence and routine governmental action*

Under Article 78dd-1(c), 78dd-2(c) and 78dd-3(c), an affirmative defence may be asserted where a payment was a "reasonable and *bona fide* expenditure, such as travel and lodging expenses", incurred by or on behalf of a foreign official and "directly related" to the "promotion, demonstration, or explanation of products or services" or "the execution or performance of a contract with a foreign government or agency thereof". Such provision has no equivalent in the Convention. The Working Group expressed some doubts about the effectiveness and necessity of these provisions.

According to the commentaries to the Convention, small "facilitation" payments do not constitute payments made to "obtain or retain business or other improper advantage". The FCPA's provision concerning "routine governmental action" contains a list of such exceptions qualified by the requirement that the payment may not be made to obtain or retain business. The Working Group is concerned, however, that the list of payments is not sufficiently qualified, for example by reference to the size of the payment, and the discretionary nature and the legality of the reciprocal act, and is therefore potentially subject to misuse.

The US believes that these provisions are consistent with the requirements of the Convention because in both cases a payment that seeks a "quid pro quo" is prohibited.

1.4. *Taining or retaining business or other improper advantage*

The Convention prohibits bribes to foreign officials not only to "obtain or retain business" but also to secure any "other improper advantage". In the FCPA formulation, the language relating to an improper advantage is placed before that in respect of obtaining or retaining business. The US explained that the rationale for its formulation was to avoid doing anything by virtue of the amendment that would take away from the historic broad interpretation of the offence. The US had, prior to the amendment, interpreted the three pre-existing elements of the FCPA to encompass payments "to secure any improper advantage". Whilst the insertion of this language in the statute does clarify and reinforce this interpretation, the Working Group considered that the prospect of the chosen formulation causing problems in the prosecution of offences could not be entirely dismissed.

2. *Sanctions*

The Convention requires Parties to institute "effective, proportionate, and dissuasive criminal penalties" comparable to those applicable to bribery of the Party's own domestic officials. Although the FCPA prescribes substantial criminal penalties and imposes additional civil and administrative sanctions, the Working Group noted the discrepancy between the maximum imprisonment for bribery of domestic public officials (15 years) and foreign public officials (5 years).

The Working Group noted that although the United States criminal fine provisions provide full compliance with Article 3.3 of the Convention, the FCPA does not expressly provide for seizure and confiscation of the proceeds of the bribery of foreign public

officials (the US is, however, able at the present time to seize and confiscate the bribe itself). This may have ramifications in applications for mutual legal assistance. The Working Group agrees this is a general issue for a comparative analysis of the legal situation in member countries, and that it should therefore be taken up again at a later stage.

3. *Statute of limitations*

The statute of limitations for criminal violations of the FCPA is five years from the date that the potential offence was limited. This period can be extended for three more years, upon a request by a prosecutor and a finding by a court that additional time is needed to gather evidence located abroad. Article 6 of the Convention requires an adequate period of time for investigation and prosecution. The Working Group agreed that this is a general issue for a comparative analysis of the legal situation in member countries, and that it should therefore be taken up again at a later stage.

4. *Accounting*

The Working Group noted that the FCPA's books and records and internal controls provisions apply only to publicly held corporations.

*APPENDIX 2***Principal Legal Provisions****A. Foreign Corrupt Practices Act Anti-Bribery Provisions****B. Anti-Bribery and Books and Records Provisions
of The Foreign Corrupt Practices Act**

A. FOREIGN CORRUPT PRACTICES ACT ANTI-BRIBERY PROVISIONS

United States Department of Justice
Fraud Section, Criminal Division
10th and Constitution Avenue, NW
Bond Building
Washington, D.C. 20530
Phone: (202) 514-7023 fax: (202) 514-7021
Internet: www.usdoj.gov/criminal/fraud/fcpa/fcpa.html
Email: FCPA.fraud@usdoj.gov

United States Department of Commerce
Office of the Chief Counsel for International Commerce
14th Street and Constitution Avenue, NW
Room 5882
Washington, D.C. 20230
Phone: (202) 482-0937
Fax: (202) 482-4076
Internet: www.ita.doc.gov/legal

Introduction

The 1988 Trade Act directed the Attorney General to provide guidance concerning the Department of Justice's enforcement policy with respect to the Foreign Corrupt Practices Act of 1977 ("FCPA"), 15 USC §§ 78dd-1, *et seq.*, to potential exporters and small businesses that are unable to obtain specialized counsel on issues related to the FCPA. The guidance is limited to responses to requests under the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure (described below at p. 10) and to general explanations of compliance responsibilities and potential liabilities under the FCPA. This brochure constitutes the Department of Justice's general explanation of the FCPA.

US firms seeking to do business in foreign markets must be familiar with the FCPA. In general, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. The Department of Justice is the chief enforcement agency, with a coordinate role played by the Securities and Exchange Commission (SEC). The Office of General Counsel of the Department of Commerce also answers general questions from US exporters concerning the FCPA's basic requirements and constraints.

This brochure is intended to provide a general description of the FCPA and is not intended to substitute for the advice of private counsel on specific issues related to the FCPA. Moreover, material in this brochure is not intended to set forth the present enforcement intentions of the Department of Justice or the SEC with respect to particular fact situations.

Background

As a result of SEC investigations in the mid-1970's, over 400 US companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.

The FCPA was intended to have and has had an enormous impact on the way American firms do business. Several firms that paid bribes to foreign officials have been the subject of criminal and civil enforcement actions, resulting in large fines and suspension and debarment from federal procurement contracting, and their employees and officers have gone to jail. To avoid such consequences, many firms have implemented detailed compliance programs intended to prevent and to detect any improper payments by employees and agents.

Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes. Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA. In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States ratified this Convention and enacted implementing legislation in 1998. See Convention and Commentaries on the DOJ web site.

The anti-bribery provisions of the FCPA make it unlawful for a US person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. See 15 USC. § 78m. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. This brochure discusses only the anti-bribery provisions.

Enforcement

The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the anti-bribery provisions with respect to issuers.

Anti-bribery Provisions

Basic prohibition

The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. With respect to the basic prohibition, there are five elements which must be met to constitute a violation of the Act:

A. **Who** – The FCPA potentially applies to *any* individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the anti-bribery provisions or if they conspire to violate those provisions.

Under the FCPA, US jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an “issuer”, a “domestic concern”, or a foreign national or business.

An “issuer” is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A “domestic concern” is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organisation, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.

Issuers and domestic concerns may be held liable under the FCPA under *either* territorial or nationality jurisdiction principles. For acts taken within the territory of the United States, issuers and domestic concerns are liable if they take an act in furtherance of a corrupt payment to a foreign official using the US mails or other means or instrumentalities of interstate commerce. Such means or instrumentalities include telephone calls, facsimile transmissions, wire transfers, and interstate or international travel. In addition, issuers and domestic concerns may be held liable for any act in furtherance of a corrupt payment taken *outside* the United States. Thus, a US company or national may be held liable for a corrupt payment authorized by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States.

Prior to 1998, foreign companies, with the exception of those who qualified as “issuers”, and foreign nationals were not covered by the FCPA. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. A foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States. There is, however, no requirement that such act make use of the US mails or other means or instrumentalities of interstate commerce.

Finally, US parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can US citizens or residents, themselves “domestic concerns,” who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

B. Corrupt intent – The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person. You should note that the FCPA does not require that a corrupt act *succeed* in its purpose. The *offer* or *promise* of a corrupt payment can constitute a violation of the statute. The FCPA prohibits any corrupt payment intended to *influence* any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to *obtain* any improper advantage, or to *induce* a foreign official to use his or her influence improperly to affect or influence any act or decision.

C. Payment – The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value.

D. Recipient – The prohibition extends only to corrupt payments to a *foreign official*, a *foreign political party or party official*, or any candidate for foreign political office. A “foreign official” means any officer or employee of a foreign government, a public international organisation, or any department or agency thereof, or any person acting in an official capacity. You should consider utilizing the Department of Justice’s Foreign Corrupt Practices Act Opinion Procedure for particular questions as to the definition of a “foreign official”, such as whether a member of a royal family, a member of a legislative body, or an official of a state-owned business enterprise would be considered a “foreign official”.

The FCPA applies to payments to *any* public official, regardless of rank or position. The FCPA focuses on the *purpose* of the payment instead of the particular duties of the official receiving the payment, offer, or promise of payment, and there are exceptions to the anti-bribery provision for “facilitating payments for routine governmental action” (see below).

E. Business Purpose Test – The FCPA prohibits payments made in order to assist the firm in *obtaining or retaining business* for or with, or *directing business* to, any person. The Department of Justice interprets “obtaining or retaining business” broadly, such that the term encompasses more than the mere award or renewal of a contract. It should be noted that the business to be obtained or retained does *not* need to be with a foreign government or foreign government instrumentality.

Third party payments

The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term “*knowing*” includes *conscious disregard and deliberate ignorance*. The elements of an offense are essentially the same as described above, except that in this case the “recipient” is the intermediary who is making the payment to the requisite “foreign official”.

Intermediaries may include joint venture partners or agents. To avoid being held liable for corrupt third party payments, US companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business

relationship with reputable and qualified partners and representatives. Such due diligence may include investigating potential foreign representatives and joint venture partners to determine if they are in fact qualified for the position, whether they have personal or professional ties to the government, the number and reputation of their clientele, and their reputation with the US Embassy or Consulate and with local bankers, clients, and other business associates. In addition, in negotiating a business relationship, the US firm should be aware of so-called “red flags”, *i.e.*, unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the US firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.

You should seek the advice of counsel and consider utilizing the Department of Justice’s Foreign Corrupt Practices Act Opinion Procedure for particular questions relating to third party payments.

Permissible Payments and Affirmative Defenses

The FCPA contains an explicit exception to the bribery prohibition for “facilitating payments” for “routine governmental action” and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.

Facilitating payments for routine governmental actions

There is an exception to the anti-bribery prohibition for payments to facilitate or expedite performance of a “routine governmental action.” The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

Actions “similar” to these are also covered by this exception. If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether to utilize the Justice Department’s Foreign Corrupt Practices Opinion Procedure, described below on p. 10.

“Routine governmental action” does *not* include any decision by a foreign official to award new business or to continue business with a particular party.

Affirmative defenses

A person charged with a violation of the FCPA’s anti-bribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation.

Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the

Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment.

Moreover, because these defenses are "affirmative defenses," the defendant is required to show in the first instance that the payment met these requirements. The prosecution does not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.

Sanctions Against Bribery

Criminal

The following criminal penalties may be imposed for violations of the FCPA's anti-bribery provisions: corporations and other business entities are subject to a fine of up to \$2 000 000; officers, directors, stockholders, employees, and agents are subject to a fine of up to \$100 000 and imprisonment for up to five years. Moreover, under the Alternative Fines Act, these fines may be actually quite higher – the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. You should also be aware that fines imposed on individuals may *not* be paid by their employer or principal.

Civil

The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to \$10 000 against any firm *as well as* any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the anti-bribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of *i*) the gross amount of the pecuniary gain to the defendant as a result of the violation, or *ii*) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from \$5 000 to \$100 000 for a natural person and \$50 000 to \$500 000 for any other person.

The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the anti-bribery provisions.

Other governmental action

Under guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. *Indictment alone can lead to suspension of the right to do business with the government.* The President has directed that no executive agency shall allow any party to participate in any procurement or non-procurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or non-procurement activity.

In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA; and a payment made to a foreign government

official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

Private cause of action

Conduct that violates the anti-bribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.

Guidance from the Government

The Department of Justice has established a Foreign Corrupt Practices Act Opinion Procedure by which any US company or national may request a statement of the Justice Department's present enforcement intentions under the anti-bribery provisions of the FCPA regarding any proposed business conduct. The details of the opinion procedure may be found at 28 CFR Part 80. Under this procedure, the Attorney General will issue an opinion in response to a specific inquiry from a person or firm within thirty days of the request. (The thirty-day period does not run until the Department of Justice has received all the information it requires to issue the opinion.) Conduct for which the Department of Justice has issued an opinion stating that the conduct conforms with current enforcement policy will be entitled to a presumption, in any subsequent enforcement action, of conformity with the FCPA. Copies of releases issued regarding previous opinions are available on the Department of Justice's FCPA web site.

For further information from the Department of Justice about the FCPA and the Foreign Corrupt Practices Act Opinion Procedure, contact Peter B. Clark, Deputy Chief, or Phillip Urofsky, Senior Trial Attorney, Fraud Section, Criminal Division, US Department of Justice, P.O. Box. 28188, McPherson Square, Washington, D.C. 20038, (202) 514-7023.

Although the Department of Commerce has no enforcement role with respect to the FCPA, it supplies general guidance to US exporters who have questions about the FCPA and about international developments concerning the FCPA. For further information from the Department of Commerce about the FCPA contact Eleanor Roberts Lewis, Chief Counsel for International Commerce, or Arthur Aronoff, Senior Counsel, Office of the Chief Counsel for International Commerce, US Department of Commerce, Room 5882, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, (202) 482-0937.

Last updated: March 15, 2002, usdoj/criminal/fraud/dlj

B. ANTI-BRIBERY AND BOOKS AND RECORDS PROVISIONS OF THE FOREIGN CORRUPT PRACTICES ACT

Current through Pub. L. 105-366 (November 10, 1998)

United States code

Title 15. Commerce and trade

Chapter 2b. Securities exchanges

§ 78m. Periodical and Other Reports

a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security:

- 1) Such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.
- 2) Such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

b) Form of report; books, records, and internal accounting; directives

- 2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall:
 - A. make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
 - B. devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:
 - i) transactions are executed in accordance with management's general or specific authorization;
 - ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

- iii) access to assets is permitted only in accordance with management's general or specific authorization; and
 - iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.
1. A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.
 2. B) Each head of a Federal department or agency of the United States who issues such a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.
 - 4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.
 - 5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).
 - 6) Where an issuer which has a class of securities registered pursuant to section 781 of this title or an issuer which is required to file reports pursuant to section 780(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).
 - 7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

§ 78dd-1. Prohibited Foreign Trade Practices by Issuers

a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to:

1) any foreign official for purposes of:

- A) influencing any act or decision of such foreign official in his official capacity, *ii)* inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or *iii)* securing any improper advantage; or
- B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality;

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

2) any foreign political party or official thereof or any candidate for foreign political office for purposes of:

- A) *i)* influencing any act or decision of such party, official, or candidate in its or his official capacity, *ii)* inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or *iii)* securing any improper advantage; or
- B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of -*i)* influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, *ii)* inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or *iii)* securing any improper advantage; or

- A) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that:

- 1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or
- 2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and *bona fide* expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to-

- A) the promotion, demonstration, or explanation of products or services; or
- B) the execution or performance of a contract with a foreign government or agency thereof.

d) Guidelines by Attorney General

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue-

- 1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and
- 2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

e) Opinions of Attorney General

- 1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weight all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.
- 2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.
- 3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.
- 4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

f) Definitions

For purposes of this section:

- 1) A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

B) For purposes of subparagraph (A), the term “public international organization” means:

- i) an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 USC § 288); or
- ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

- I. A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if:

- i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
- ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

- 3) A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in:

- i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- ii) processing governmental papers, such as visas and work orders;
- iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- v) actions of a similar nature.

B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

g) *Alternative jurisdiction*

- 1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of this subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.
- 2) As used in this subsection, the term “United States person” means a national of the United States (as defined in section 101 of the Immigration and Nationality Act [8 USC § 1101]) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

§ 78dd-2. Prohibited Foreign Trade Practices by Domestic Concerns

a) *Prohibition*

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to:

- 1) any foreign official for purposes of:
 - A) *i)* influencing any act or decision of such foreign official in his official capacity, *ii)* inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or *iii)* securing any improper advantage; or
 - B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

- 2) any foreign political party or official thereof or any candidate for foreign political office for purposes of:

- A) *i)* influencing any act or decision of such party, official, or candidate in its or his official capacity, *ii)* inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or *iii)* securing any improper advantage; or
- B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

- 3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of:
 - A) *i)* influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, *ii)* inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or *iii)* securing any improper advantage; or
 - B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that:

- 1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or
- 2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and *bona fide* expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to-
 - A) the promotion, demonstration, or explanation of products or services; or
 - B) the execution or performance of a contract with a foreign government or agency thereof.

d) Injunctive relief

- 1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.
- 2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.
- 3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

e) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue-

- 1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

- 2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

f) Opinions of Attorney General

- 1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.
- 2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, be made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.
- 3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.
- 4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small

businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

g) Penalties

- 1) A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than \$2 000 000.
 B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.
- 2) A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than \$100,000 or imprisoned not more than 5 years, or both.
 B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$10 000 imposed in an action brought by the Attorney General.
- 3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

h) Definitions

For purposes of this section:

- 1) The term "domestic concern" means:
 - A) any individual who is a citizen, national, or resident of the United States; and
 - B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.
- 2) A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

- B) For purposes of subparagraph (A), the term “public international organization” means:
- i) an organization that has been designated by Executive order pursuant to Section 1 of the International Organizations Immunities Act (22 USC § 288); or
 - ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.
- 3) A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if:
- ii) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
 - iii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
- B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.
- 4) A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in:
- i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
 - ii) processing governmental papers, such as visas and work orders;
 - iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
 - iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
 - v) actions of a similar nature.
- B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.
- 5) The term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of:
- A) a telephone or other interstate means of communication, or
 - B) any other interstate instrumentality.

i) Alternative jurisdiction

- 1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.
- 2) As used in this subsection, a "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 USC § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

§ 78dd-3. Prohibited Foreign Trade Practices by Persons Other than Issuers or Domestic Concerns

a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or a domestic concern, as defined in section 104 of this Act), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to-

- 1) any foreign official for purposes of-
 - A) *i)* influencing any act or decision of such foreign official in his official capacity, *ii)* inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or *iii)* securing any improper advantage; or
 - B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;
- 2) any foreign political party or official thereof or any candidate for foreign political office for purposes of-
 - A) *i)* influencing any act or decision of such party, official, or candidate in its or his official capacity, *ii)* inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or *iii)* securing any improper advantage; or

- B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

- 3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of-

- A) i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or iii) securing any improper advantage; or

- B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

b) Exception for routine governmental action

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) of this section that:

- 1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or
- 2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and *bona fide* expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to:
 - A) the promotion, demonstration, or explanation of products or services; or
 - B) the execution or performance of a contract with a foreign government or agency thereof.

d) Injunctive relief

- 1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.
- 2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.
- 3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.
- 4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

e) Penalties

- 1) A) Any juridical person that violates subsection (a) of this section shall be fined not more than \$2,000,000.
 B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than \$10 000 imposed in an action brought by the Attorney General.
- 2) A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than \$100 000 or imprisoned not more than 5 years, or both.
 B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than \$10 000 imposed in an action brought by the Attorney General.
- 3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

f) Definitions

For purposes of this section:

- 1) The term "person," when referring to an offender, means any natural person other than a. national of the United States (as defined in 8 USC § 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.
- 2) A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.
 B) For purposes of subparagraph (A), the term "public international organization" means:
 - i) an organization that has been designated by Executive Order pursuant to Section 1 of the International Organizations Immunities Act (22 USC § 288); or
 - ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.
- 3) A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if:
 - i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
 - ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
 B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.
- 4) A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in:
 - i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
 - ii) processing governmental papers, such as visas and work orders;
 - iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
 - iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
 - v) actions of a similar nature.

- B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.
- 5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of:
- A) a telephone or other interstate means of communication, or
 - B) any other interstate instrumentality.

§ 78ff. Penalties

a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$1,000,000, or imprisoned not more than 10 years, or both, except that when such person is a person other than a natural person, a fine not exceeding \$2,500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78o of this title or any rule or regulation thereunder shall forfeit to the United States the sum of \$100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

- 1) A) Any issuer that violates subsection (a) or (g) of section 30A of this title shall be fined not more than \$2,000,000.

B) Any issuer that violates subsection (a) or (g) of section 30A of this title shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.
- 2) A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title shall be fined not more than \$100,000, or imprisoned not more than 5 years, or both.

B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.
- 3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

APPENDIX 3

Suggested Further Reading

Complying with the Foreign Corrupt Practices Act

BLACK, Stephen F., WITTEN, Roger M., New York: M. Bender, 1997.

(Foreign Corrupt Practices Act of 1977 - Foreign trade regulation - United States - Criminal provisions, Bribery - United States, Disclosure of information - Law and legislation - United States)

Complying With The Foreign Corrupt Practices Act: A Guide For U.S. Firms Doing Business In The International Marketplace

CRUVER, Donald, R., American Bar Association, 1994. (Bribery- Corporate Law- United States)

Complying with U.S. Antibribery Laws

GEROE, M.G., *The International Lawyer*, vol.31 n.4 (winter 1997).

(Bribery - Legislation - Prevention - United States, Bribery - Prevention - FCPA - Consequences - Private Sector - United States)

Doing Business Under the Foreign Corrupt Practices Act

ZARIN, Don, Washington D.C.: Practising Law Institute, 1995.

(Foreign Corrupt Practices Act of 1977 - United States, Bribery - Corporations - Corrupt practices - United States, Corporation law - United States - Criminal provisions, Disclosure of information - Law and legislation - United States)

Foreign Corrupt Practices Act Reporter

Business Laws, Inc., Chesterland, Ohio.: Business Laws, Inc.

The Foreign Corrupt Practices Act: How to Comply under the New Amendments and the OECD Convention

AMERICAN BAR ASSOCIATION, ed., Chicago: American Bar Association, 1999.

(Foreign Corrupt Practices Act of 1977 - United States, Bribery - Corporation law - United States - Criminal provisions, Disclosure of information - Law and legislation - Criminal provisions - United States, Corporations - Corrupt practices - United States, OECD Convention)

The Foreign Corrupt Practices Act: Anatomy of a Statute

GREANIAS, George C, DUANE, Windsor, Lexington, Mass: Lexington Books, 1982, 187 p.

(Foreign Corrupt Practices Act of 1977 - United States, Corporation law - United States - Criminal provisions, Bribery - United States, Corporations - Corrupt practices - United States, Disclosure of information - Law and legislation - United States - Criminal provisions)

The Foreign Corrupt Practices Act: The Accounting And Record-Keeping Provisions, in Foreign Corrupt Practices Act

DEMING, S., Chesterland, Ohio, July 2000.

(Accounting Standards - Legislation - FCPA - United States)

The International Anti-Bribery Act of 1998: Report

UNITED STATES CONGRESS, Senate Committee on Banking, Housing, and Urban Affairs, U.S. G.P.O., Washington, D.C., 1998. (Bribery- Legislation - United States)

APPENDIX 4

i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Commentaries on the Convention on Combating Bribery of Foreign Public Officials
in International Business Transactions
(Adopted by the Negotiating Conference on 21 November 1997)

ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Annex
Agreed Common Elements of Criminal Legislation and Related Action

iii) Recommendation of The Council on the Tax Deductibility of Bribes to Foreign Public Officials

iv) Parties to the Convention

Countries Having Ratified/Acceded to the Convention

(i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows:

Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".
4. For the purpose of this Convention:
 - a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
 - b) "foreign country" includes all levels and subdivisions of government, from national to local;
 - c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

Article 2

Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3

Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4

Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.
4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5

Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Article 6

Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7

Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8

Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.
2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Article 9

Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.
2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.
3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10

Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.
2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.
3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.
4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

Article 11

Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12

Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Article 13

Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.
2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14

Ratification and Depositary

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.
2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

Article 15

Entry into Force

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAF/FE/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.
2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16

Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17

Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

Annex
Statistics on OECD Exports

OECD EXPORTS			
	1990-1996	1990-1996	1990-1996
	US\$ million	%	%
		of Total OECD	of 10 largest
United States	287 118	15,9%	19,7%
Germany	254 746	14,1%	17,5%
Japan	212 665	11,8%	14,6%
France	138 471	7,7%	9,5%
United Kingdom	121 258	6,7%	8,3%
Italy	112 449	6,2%	7,7%
Canada	91 215	5,1%	6,3%
Korea (1)	81 364	4,5%	5,6%
Netherlands	81 264	4,5%	5,6%
Belgium-Luxembourg	78 598	4,4%	5,4%
Total 10 largest	1 459 148	81,0%	100%
Spain	42 469	2,4%	
Switzerland	40 395	2,2%	
Sweden	36 710	2,0%	
Mexico (1)	34 233	1,9%	
Australia	27 194	1,5%	
Denmark	24 145	1,3%	
Austria*	22 432	1,2%	
Norway	21 666	1,2%	
Ireland	19 217	1,1%	
Finland	17 296	1,0%	
Poland (1) **	12 652	0,7%	
Portugal	10 801	0,6%	
Turkey *	8 027	0,4%	
Hungary **	6 795	0,4%	
New Zealand	6 663	0,4%	
Czech Republic ***	6 263	0,3%	
Greece *	4 606	0,3%	
Iceland	949	0,1%	
Total OECD	1 801 661	100%	

Notes: * 1990-1995; ** 1991-1998; *** 1993-1996

Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 per cent of combined total exports of those ten countries, which is required for entry into force under this provision.

Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

General:

1. This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe. The Convention does not utilise the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.
2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.

Article 1. The Offence of Bribery of Foreign Public Officials:

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.
4. It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.
5. "Other improper advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

7. It is also an offence irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

9. Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12. "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.

14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.*,

on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

17. "Public international organisation" includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.

18. "Foreign country" is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office – though acting outside his competence – to make another official award a contract to that company.

Article 2. Responsibility of Legal Persons:

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3. Sanctions:

Re paragraph 3:

21. The "proceeds" of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

22. The term "confiscation" includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to “principles” includes the principles upon which such selection is based.

Article 5. Enforcement:

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, “1997 OECD Recommendation”), which recommends, *inter alia*, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

28. In Article 7, “bribery of its own public official” is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8. Accounting:

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company’s home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

30. Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31. Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

Article 10. Extradition***Re paragraph 2:***

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Article 12. Monitoring and Follow-up:

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

- i) receipt of notifications and other information submitted to it by the [participating] countries;
- ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:
 - a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

- a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.
- iii) examination of specific issues relating to bribery in international business transactions;
- ...
- v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

36. The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

Article 13. Signature and Accession:

37. The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

(ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Adopted by the Council on 23 May 1997

The Council,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Considering that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

Considering the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994, C(94)75/FINAL and the related Recommendation on the tax deductibility of bribes of foreign public officials adopted on 11 April 1996, C(96)27/FINAL; as well as the Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on 7 May 1996;

Welcoming other recent developments which further advance international understanding and co-operation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organisation of American States;

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated manner;

Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalisation rapidly;

Considering the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalisation of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

Recognising that achieving progress in this field requires not only efforts by individual countries but multilateral co-operation, monitoring and follow-up;

General

- I) **RECOMMENDS** that member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.
- II) **RECOMMENDS** that each member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:
 - i) criminal laws and their application, in accordance with section III and the Annex to this Recommendation;
 - ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;
 - iii) company and business accounting, external audit and internal control requirements and practices, in accordance with section V;
 - iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;
 - v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;
 - vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;
 - vii) international co-operation in investigations and other legal proceedings, in accordance with section VII.

Criminalisation of Bribery of Foreign Public Officials

- III) **RECOMMENDS** that member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

DECIDES, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.

Tax Deductibility

- IV) **URGES** the prompt implementation by member countries of the 1996 Recommendation which reads as follows: "that those member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal."

Accounting Requirements, External Audit and Internal Company Controls

- V) **RECOMMENDS** that member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A) Adequate accounting requirements

- i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.
- ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.
- iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B) Independent External Audit

- i) Member countries should consider whether requirements to submit to external audit are adequate.
- ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.
- iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.
- iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C) Internal company controls

- i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.
- ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.
- iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.
- iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

Public Procurement

VI) RECOMMENDS:

- i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;
- ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that member's national laws and, to the extent a member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.¹
- iii) In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.²

International Co-operation

VII) **RECOMMENDS** that member countries, in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

- i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;
- ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;
- iii) ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.

Follow-up and Institutional Arrangements

VIII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and

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1. Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.
 2. This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD members and eventually non-member countries which adhere to the Recommendation.

promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

- i) receipt of notifications and other information submitted to it by the member countries;
 - ii) regular reviews of steps taken by member countries to implement the Recommendation and to make proposals, as appropriate, to assist member countries in its implementation; these reviews will be based on the following complementary systems:
 - a system of self-evaluation, where member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
 - a system of mutual evaluation, where each member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the member country in implementing the Recommendation.
 - iii) examination of specific issues relating to bribery in international business transactions;
 - iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;
 - v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.
- IX) **NOTES** the obligation of member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.
- X) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate thereafter, and to review this Revised Recommendation within three years after its adoption.

Co-operation with Non-members

- XI) **APPEALS** to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.
- XII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

Relations with International Governmental and Non-governmental Organisations

- XIII) **INVITES** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organisations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

ANNEX

Agreed Common Elements of Criminal Legislation and Related Action

1) Elements of the Offence of Active Bribery

- i) *Bribery* is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business.
- ii) *Foreign public official* means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.
- iii) *The offeror* is any person, on his own behalf or on the behalf of any other natural person or legal entity.

2) Ancillary Elements or Offences

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.

3) Excuses and Defences

Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

4) Jurisdiction

Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.

States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

5) Sanctions

The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) Enforcement

In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offence.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) Connected Provisions (Criminal and Non-criminal)

Accounting, recordkeeping and disclosure requirements

In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud.

Money laundering

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.

8) International Co-operation

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.

Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offer or; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.

(iii) RECOMMENDATION OF THE COUNCIL ON THE TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS

adopted by the Council on 11 April 1996

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75/FINAL];

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favour bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

- I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.
- II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.

(iv) PARTIES TO THE CONVENTION
Countries Having Ratified/Acceded to the Convention*

	Country	Date of Ratification
1.	Iceland	17 August 1998
2.	Japan	13 October 1998
3.	Germany	10 November 1998
4.	Hungary	4 December 1998
5.	United States	8 December 1998
6.	Finland	10 December 1998
7.	United Kingdom	14 December 1998
8.	Canada	17 December 1998
9.	Norway	18 December 1998
10.	Bulgaria	22 December 1998
11.	Korea	4 January 1999
12.	Greece	5 February 1999
13.	Austria	20 May 1999
14.	Mexico	27 May 1999
15.	Sweden	8 June 1999
16.	Belgium	27 July 1999
17.	Slovak Republic	24 September 1999
18.	Australia	18 October 1999
19.	Spain	14 January 2000
20.	Czech Republic	21 January 2000
27.	Switzerland	31 May 2000
22.	Turkey	26 July 2000
23.	France	31 July 2000
24.	Brazil	24 August 2000
25.	Denmark	5 September 2000
26.	Poland	8 September 2000
27.	Portugal	23 November 2000
28.	Italy	15 December 2000
29.	Netherlands	12 January 2001
30.	Argentina	8 February 2001
31.	Luxembourg	21 March 2001
32.	Chile	18 April 2001
33.	New Zealand	25 June 2001
34.	Slovenia ¹	6 September 2001
35.	Ireland	22 September 2003

* In order of ratification/accession received by the Secretary General.

1. Slovenia, as a new member in the OECD Working Group on Bribery, deposited its accession instrument